IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

VERSATA SOFTWARE, INC., ET AL	) Civil Docket No. 2:07-CV-00153-CE
	) May 11, 2011
VS.	) 8:30 A.M.
	)
SAP AMERICA, INC., ET AL	)

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE CHAD EVERINGHAM
UNITED STATES MAGISTRATE JUDGE

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P R O C E E D I N G S

LAW CLERK: All rise.

(Jury in.)

THE COURT: Please be seated.

Morning, ladies and gentlemen. I hope you had a nice evening. Mr. Cole.

MR. COLE: Yes, Your Honor.

THE COURT: Why don't you reorient us to where we left off yesterday morning with Mr. Weinstein.

MR. COLE: I will, Your Honor.

THE COURT: Counsel, good morning.

MR. MELSHEIMER: Good morning, Your Honor.

THE WITNESS: Good morning, sir.

ROY WEINSTEIN, PLAINTIFFS' WITNESS, PREVIOUSLY SWORN

DIRECT CONTINUED EXAMINATION CONTINUED

BY MR. COLE:

Q. Good morning, Mr. Weinstein.

A. Good morning.

Q. Let's reorient ourselves a little bit. We were talking, I think, about damages and lost profits and we have up here the Panduit case. Can you just remind us what -- what Panduit is?

A. Yes, Panduit is a -- is a prior legal case that set forth the criteria that someone like myself is is -- is supposed to look at in doing a lost profits

calculation in a patent infringement matter.

Q. And your conclusion again about lost profits here was -- was what?

A. I concluded that lost profits due Trilogy as a consequence of SAP's infringement of the '350 patent amount to approximately $285 million.

Q. And --

A. Roughly three million dollars per customer.

Q. And how many customers?

A. That was based on 93 lost customers.

Q. Okay. All right. I think we had left off yesterday, we were -- we had been talking about the -- the first prong on Panduit, the demand prong, and I just want to conclude with that and then we'll move to the second one.

In conclusion, can you tell me whether or not after your review of all the evidence in this case, it's your opinion that there is demand for the patented product and the patented invention?

A. Yes, sir.

Q. And is that true during the damages period?

A. It is, yes, sir.

Q. Was it also true back during the period when Trilogy had this technology on an exclusive basis?

A. Correct. It was -- it was also true during the

1996 to 1998 period, which is the basis for my calculation of 93 lost customers.

Q. Okay. All right. The second factor is absence of noninfringing alternatives. Can you tell us what that means?

A. Yes. That means that one of the things that I am to consider is -- is the extent to which there are alternatives available in the market that would serve as adequate substitutes for, in this case, Trilogy's patented technology.

Q. Okay. Did you examine that issue?

A. I did.

Q. And did you review the evidence available?

A. I did.

Q. And what was your conclusion about whether there were acceptable noninfringing alternatives to the patented technology in the relevant period of time?

A. I concluded that there were no acceptable, commercially acceptable noninfringing alternatives to Trilogy's patent during the damage period.

Q. Okay. And of the lost customers you're claiming, what is the pool of customers from which you're claiming Trilogy lost sales?

A. The -- the pool of customers includes 480 Tier 1 SAP customers who had the infringing technology,

and an additional 880 Tier 2, that is smaller SAP customers, who also had the infringing technology. So the entire pool available here for lost customer sales is a total of about 1,360 of which, based on my computation, 93 customers would have gone to Trilogy but for the infringement.

Q. And of the 93 you believe would have gone to Trilogy, are those Tier 1 or Tier 2 or both?

A. Those are Tier 1 customers.

Q. Okay. So you limited your lost profit claim and lost customer claim to only the Tier 1 market?

A. Yes, I did. Only the larger customers are included, though I recognize that there was significant opportunity to Trilogy as well associated with smaller SAP customers.

Q. Okay. And what are the alternatives to a Tier 1 or a large SAP customer for pricing; in other words, where can they get their pricing needs met? Can they do that within SAP?

A. Well, if -- if the infringing technology is no longer available to SAP, as would have been the case beginning April 2003, then the only place that those SAP customers can turn for this technology is to Trilogy.

Q. Well, after SAP was found to infringe, did -- I think we heard Mr. Gupta describe that they made some

changes to their product?

A. Yes. I understood his testimony to be that SAP made -- made a patch or did some sort of change to the -- to the -- to the product, yes.

Q. And what was Mr. Gupta's testimony about whether or not the modification they made actually avoids the patent?

A. I understood his testimony to be that SAP continues to infringe after that modification.

Q. And -- and that was made in what year?

A. That was made in, I guess, 2009, 2010.

Q. 2010?

A. Yeah.

Q. And what does that tell you about the available acceptable noninfringing alternatives to SAP to this patent as late as last year?

A. Well, it tells me that SAP didn't have an acceptable noninfringing alternative. I mean, one of the things SAP could have done is gone back to the functionality it had prior to inserting Trilogy's functionality in roughly October 1998. As I understand Mr. Gupta's testimony, that's what SAP did.

It -- it made a patch to Trilogy's functionality instead. And so what that tells me is that there was no commercially acceptable noninfringing

alternative available to SAP as of 2010.
Q. Okay. And did you hear Mr. Carter and Mr. Smith's discussions and Mr. Gupta's discussion about other products that were on the market generally and whether those would be acceptable to bolt-on to a SAP product?
A. I did.
Q. Okay. And is that consistent with your views?
A. It -- it is. I mean, I understood their testimony to -- to support a conclusion, again, that there were no acceptable commercially acceptable noninfringing alternatives here.
Q. Okay. And do you believe the second Panduit factor is met in this case?
A. I do.
Q. All right. Let's move to the third Panduit factor, which is manufacturing and marketing capacity, and can you tell us what that means?
A. Yes. In this case I've -- I've concluded that Trilogy would have made 93 additional sales but for SAP's infringement. Manufacturing and marketing capacity refers to the need for the patent-holder to be able to support those sales, that is to be able to produce the product and -- and market it and bring it to market successfully. So there -- there needs to be

those capabilities in place.

Q. Had Trilogy in the past successfully manufactured and marketed Pricer?

A. Yes. We know that in -- in the 1996 to 1998 period, Trilogy had successfully manufactured and marketed its Pricer product to 21 -- 21 customers, pure Pricer isolated sales, and had sold Pricer to a total of roughly close to 80 customers in total. And so what that means is that in the past, Trilogy had the manufacturing and marketing capacity available to -- to make those additional sales. It had done it before, and I concluded it could have done it again.

Q. All right. In -- in your opinion, in the but-for world here, in other words, the world where Trilogy's patent comes out in 2003, they can exclude everybody else from the marketplace and can go and compete on an exclusive basis, in that world you are assuming that Trilogy would have been able to do more, make more sales, achieve greater success than they had actually in the real world when they had an exclusive?

A. No. What I -- what I'm -- what I'm concluding here is that Trilogy could have ramped up and made these additional sales beginning in, roughly, April 2003 at the same pace at which it ramped up and made actual sales when it had an exclusive beginning in 1996.

And -- and the -- the figures that I calculate, which feed into my total of 93 sales, involve a ramp-up of roughly, I think, six sales in the first year, 11 in the second, 12 in the third, and 12 sales per year out through the end of April of 2011.

Q. Now, are you assuming that it would have been free to Trilogy to make those additional sales or did you include costs to lower the profits?

A. No. In calculating lost profits, what I did is first calculate the sales revenue and then subtract costs associated with making those sales and those -- those costs that I subtracted include direct costs of making those sales, plus costs associated with research and development efforts, plus costs associated with -- with what's called SG&A, selling, general and administrative expenses.

So I first calculate what the sales revenues would be and then subtract out these additional -- these -- these additional costs that would have been incurred in -- in order to come up with lost profits.

MR. COLE: Mr. Diaz, if we could have Slide 14.

Q. (By Mr. Cole) I -- I think you -- you mentioned several times that -- how you calculated the

number of lost customers per year and can you tell us what this slide shows here?

A. Yes. This is Trilogy's actual experience, that is, that is this is the number of Pricer -- new Pricer customers it had in 1996, '97, and '98; in other words, eight new customers in '96, 11 in 1997, and 12 in 1998. And I base my calculation on that actual experience that Trilogy had during the period when it had an exclusive, prior to the time that SAP incorporated Trilogy's functionality.

Q. Okay.

MR. COLE: And Mr. Diaz, if we could have Slide 17, please.

Q. (By Mr. Cole) I just want to make something clear here. Now, in -- in this -- this slide we've seen a lot. There are a lot more than eight, 11, and 12 customers that Trilogy actually sold in total here and I'm -- I'm just trying to find out why did you only say Trilogy made eight, 11, and 12 sales in the -- during the actual years?

A. Well, these are -- these are Pricer customers and so I'm focusing on -- on new Pricer customer sales, new customer -- Pricer customer sales during that period.

Q. And -- well, let me -- let me -- let me ask you

this: Are you -- are the new sales you were looking at in your lost profits' analysis all of the sales Trilogy made in that period or just the Tier 1 sales?

A. No, these are the Tier 1, the larger customers.

Q. And the slide we have up here, the -- the list of all customers, that's Tier 1 and Tier 2?

A. Right. You can see there there are some -- some smaller entities there as well. And even though Trilogy sold to those smaller entities, I'm -- I'm limiting this computation to the larger Pricer customers.

Q. Okay. So if we see here it looks like '96, there were 16 new customers; '97, there were 18; and '98, there were 25, but you took fewer than that as your basis for comparison; is that fair?

A. I did. I did.

Q. Okay.

MR. COLE: All right. If we can go back to the one we were on before, Mr. Diaz.

Q. (By Mr. Cole) Okay. So that's where the eight, 11, and 12 come from?

A. Correct.

MR. COLE: All right. Now, if we could go to the next slide, please?

Q. (By Mr. Cole) And you can see here the date

has changed, now we're at 2003, right?

A. Right.

Q. And this is -- this is your analysis of the but-for world, correct?

A. Correct. Correct. And so what I've -- what I've done now is estimate the actual number of customers that Trilogy would have obtained during the infringement period beginning in April 2003, and you can see that I've held constant that number 12 throughout the period after 2005, despite the fact that Trilogy's sales revenues had been increasing during the 1996 period.

Q. And why did you do that?

A. That -- that was an effort to be overly conservative here. So I assume that after getting 12 new customers in 2005, Trilogy would have continued to -- to obtain an additional 12 new customers each year during the infringement period.

Q. Okay.

MR. COLE: If -- if we could go back, Mr. Diaz, to the original one.

Q. (By Mr. Cole) If you see in '96, we had eight new customers in '96?

MR. COLE: And then if we can go back to the damage period.

Q. (By Mr. Cole) But we only have six in 2003,

why did you start at a lower number in 2003 than the actual '96 experience?

A. That's because the first infringement occurs in April of 2003 and I didn't want to calculate any damages prior to the date of first infringement. And so what I did is I prorated the eight customers from the first year down to reflect the fact that 2003 is a partial year.

Q. Okay. And just so we have it in the record, if you could tell us the -- the number of lost customers in your analysis per year from 2003 to 2010?

A. Just give me one second.

Q. Sure.

A. In -- in 2003, it's six lost customers. 2004, it's 11. 2005, 12 lost customers. 26, 12 lost customers. 2007, 12 lost customers. 2008, 12 lost customers. 2009, 12 lost customers. 2010, 12 lost customers. And then there's one additional number which would make this total equal 93 for a partial year in 2011.

Q. You think it's four?

A. Yeah. The -- the number shown the -- through 2010 is 89. And then for the partial year of 2011, there's an additional four customers, which takes us through the end of April of this year.

Q. Okay. Now, at the time SAP made the change to its product that Mr. Gupta discussed, how many lost sales happened after that change; in other words, how many lost sales after the modified product began to be sales --

A. And what's -- what's the date of that?

Q. That was May of 2010.

A. Well, you -- you would prorate that -- prorate that back. So we know there were four in 2011, and roughly seven after May in 2010. So that would be roughly 11 customers subsequent to that change.

Q. Okay. So 11 of the lost sales occurred after the modified product?

A. Correct.

Q. All right. Now, these lost customers, do they include only the Pricer led deals or do they include the other Trilogy customers that bought Pricer along with, for example, configuration or some of the other Trilogy Software we -- we heard about today?

A. Well, these are the -- these are the number of customers which I believe Trilogy would have sold to but for SAP's infringement, and it's based on Trilogy's actual experience with sales of Pricer to its -- to its customers.

Q. Okay. For example, Hewlett Packard and IBM

bought Trilogy's Pricer product, but we didn't have those as an isolated deal because they also bought other product?

A. Correct. Correct.

Q. Okay. And do you believe it's appropriate to -- to find there to be lost sales of customers like that who liked other Trilogy Software in addition to Pricer?

A. Sure. Sure, but I -- I -- I limited my computation as -- as set forth here.

Q. Okay. Well, let me ask you this: Did you also run another calculation just to determine what the numbers would look like if you only limited yourself to the Pricer isolated deals that we saw in 1995 through 1998?

A. I did.

Q. And can you just briefly give us what those numbers would be in terms of lost customers from 2003 to 2011?

A. Right. If -- if you limit if -- if you limited this calculation to Pricer-led deals that Trilogy actually made between 1996 and 1998, the total number of lost customers would be 36 lost customers instead of 93.

Q. Okay. And how does that ramp up year to year?

A. It ramps up, it begins with one lost customer

in the first year, three in the second, five in the third, and then five lost customers for each of the years out through 2010, and then prorated for the period through May of 2011. I think that's a final number of two lost customers during that period.

Q. Okay. And so the -- the -- again, to match the last thing we just talked about, for the period of time after the -- the modified product, would that be about five lost customers?

A. Correct. Right. It would be three lost customers, three lost Pricer-led customers in 2010 plus another two in 2011.

Q. Now, in your analysis -- well, let me -- let me back up. Which one do you think is the appropriate way to measure lost profits here?

A. I believe that the 93 lost customers is the appropriate method. Remember, that's 93 lost customers relative to more than 1300 SAP customers that had the infringing technology. So that's -- that's less than 10 percent of the available customers that had infringing functionality from SAP. So I think that's a fairly conservative approach.

Q. In your work, did you -- are you counting value in your lost profits that would be attributable to Trilogy's configuration software or commission software

or other software?

A. No. This is -- the value here is based on the value of the Pricer product.

Q. And let's talk now a little bit about how -- how you quantified the amount of lost profits in -- in dollar terms.

MR. COLE: Mr. Diaz, if we could go to Page -- excuse me, Slide 7.

Q. (By Mr. Cole) Okay. Let's -- if you could just take us through this slide, if you would, please.

A. Sure. Line one in this slide is the number of lost customers that I calculated. That's the 93 lost customers that -- that I've been describing.

Line two is Trilogy's average license revenue per customer associated with 12 Pricer-isolated sales that Trilogy actually made between 1996 and 1998. That's Trilogy's actual licensed revenue during the period that it had an exclusive for its 12 Pricer-isolated Tier 1 customers; that is, larger Trilogy customers. And so when I -- and that number is approximately 1.8 million on average per customer.

Line three reflects the calculation of revenues that one obtains by multiplying the 93 lost customers times the average revenue per customer, and that's lost license revenue of approximately $169

million.

Q. Okay. Just for the record, the number is 169,494,980; is that right?

A. Correct.

Q. Okay. All right. We now added some more information here. Could you fill in the -- the new stuff?

A. Right. In -- in calculating lost profits, it's not appropriate to limit one's self to the revenues that would be obtained. One has to subtract the costs associated with attaining those revenues to get from revenue to profit. And so what I did is I went to audited Trilogy financial statements for its 10 largest customers over a 12-year period, that includes both the damage period and prior to the damage period, and found that Trilogy's profit margin was approximately 72 percent for -- for those largest customers.

And so what I did is take 72 percent times the 169 million in order to calculate profits associated with license revenue that would have been obtained from these 93 customers and that number is approximately 122.5 million dollars. That's the profit that Trilogy would have made had it sold licenses to Pricer to 93 customers.

Q. Now, the -- the figure you use here for a

profit margin is 72 percent. Is that -- are you confident that's the correct number?

A. I am.

Q. And I understand that SAP's expert disagrees with that; is that right?

A. He seems to, yes.

Q. Okay. Just let -- have you reviewed his -- his -- his profit calculations?

A. I have.

Q. And do you agree with them?

A. I don't.

Q. Okay. All right. Let's continue on this slide. I think we have some more information to fill in, or maybe we got the next -- I'm sorry, next slide. Okay.

MR. COLE: Oh, wait. Sorry, Mr. Diaz, let's try Slide 8. Okay. Yeah, never mind.

Q. (By Mr. Cole) All right. So we have at the top here lost profits from licenses, is that the 122.5 million that you -- that we just went over?

A. Right. That's -- that's the number that I -- I just described that's carried over. That's the lost profits from licensing.

Q. Okay. Now, we have another line item here that says lost profits from maintenance. What is

maintenance?

A. Well, maintenance refers to an additional revenue stream that's available to Trilogy when it -- when it entered -- enters into license agreements with its customers. So when Trilogy does a license deal of the Pricer product, it also obtains maintenance revenue over time associated with maintaining the ability of the -- of the customer to use that product.

Q. Okay. And how did -- how was maintenance calculated by Trilogy to -- when it sold to its customers?

A. Well, what I did is I examined Trilogy's actual business records and I found that on average, maintenance revenues amounted to somewhere between 15 and 18 percent of Trilogy's license revenue. In other words, for every hundred dollars of license revenue that Trilogy contracted to receive, over time it would also receive somewhere between 15 and 18 dollars each year in -- in maintenance revenue.

Q. Okay.

A. And so the point here is that Trilogy also derives profits from maintenance when it enters into license agreements.

Q. Okay. If Trilogy is unable to make a sale -- a license sale, does it also lose maintenance revenue?

A. Right. If it doesn't get the license sale, then it doesn't get the maintenance revenue or the profits on that maintenance revenue.

Q. In -- in -- in your examination of the record, did historically Trilogy get maintenance revenue when it was able to win Pricer customers?

A. It did. It did, absolutely.

Q. Okay. And you mentioned it would -- if the figure ran between 15 and 18 percent per year of the license amount?

A. Correct.

Q. And what figure did you use?

A. So what I did is I took the low end of that, I took 15 percent of the license revenue that I calculated and assumed that Trilogy would get that revenue for six years associated with each license agreement and that allowed me to calculate what it -- what its maintenance revenue would have been had it made those additional 93 sales.

And then the final step was to subtract out the cost associated with that maintenance revenue, and once again, I went to Trilogy's audited financials, determined that those costs were roughly 72 percent of revenues -- excuse me, determined -- determined that those costs were roughly 28 percent of revenues, that

the margin was 72 percent. So I subtracted out the cost and when you -- when you do the math the same way that was done for licenses, the lost profits from maintenance revenue are about 67.6 million dollars.

Q. Okay. Now, you mentioned that you assumed it would be for six years. Were you in the court when Mr. Carter talked about how often a typical customer would continue to pay maintenance for Pricer?

A. I was.

Q. And he -- what was his answer, do you recall?

A. I -- I don't recall specifically, but my -- my review of the records was that maintenance went on for at least seven years, typically.

Q. Okay. And how many --

A. Not -- not all the time, but it varied, but at least seven years and I used six years.

Q. Okay. And are you consist -- are you comfortable that that -- that -- that a six-year typical maintenance window is consistent with the evidence?

A. It is.

Q. Okay. All right. I think we have one more element of your lost profit calculation. It says lost profits from consulting. Can you tell us what that is?

A. Yes. Once again when Trilogy enters into license agreements, it also typically obtains consulting

revenue associated with services that it provides its licensees in connection with the -- the Trilogy product. And so what I did here was examine the historic record of Trilogy with respect to consulting revenues that it obtained and basically what I found is that sometimes the consulting revenues would actually exceed the license revenues.

Sometimes the consulting revenues associated with the license were as much as 125 percent of what the license revenue was. Sometimes they were less than the license revenue.

The -- the median consulting revenue, which means median is one form of average, that the median consulting revenue relative to license revenue was about 86 percent, meaning that half the time consulting revenue was less than 86 percent of license revenue and half the time it was greater than that. So I used 86 percent of license revenue to calculate what consulting revenues would have been had Trilogy actually entered into these licenses.

The -- the final step here was to, once again, allow for costs associated with providing that consulting service. In this instance, the margins were about 67 percent instead of 72 percent. And so I subtracted out costs as appropriate, did the math, and

lost profits from consulting are about 95 million dollars.

Q. Okay. And I think you mentioned when you calculated the lost profits from licenses, you -- the basis was the average Pricer-isolated license revenue in Tier 1; is that right?

A. Correct.

Q. Now, the -- the maintenance and consulting revenues, those appear to be dependent upon the license revenue; in other words, they flow directly from that?

A. They do.

Q. As a result of that, are you -- are you comfortable that the lost maintenance revenue and lost consulting revenue is limited to the isolated Pricer value as opposed to other products that Trilogy sells?

A. No. It's definitely limited to the Pricer value, to the Pricer product.

Q. Okay.

MR. COLE: Mr. Diaz, I think there's maybe one more to total it.

Q. (By Mr. Cole) Okay. I think we've seen that number before, but just for the record, if you could tell us in your opinion what the total lost profits are?

A. Yeah. The final step is to add up lost profits from licenses, from maintenance and consulting and the

sum of those three elements is 285.5 million dollars, and that comes to about $3 million per customer. That is, there are 93 lost customers, $285 million in lost profits, that means that the profit associated with each lost customer is about $3 million.

Q. Okay. Now, let me ask you about something that you may be asked about in cross. You used the same revenue figure that was experienced by Trilogy in the exclusive period for the losses in the damages period, right? In other words, 1.8 million?

A. I did.

Q. And why do -- do you feel that's appropriate?

A. Absolutely it's appropriate.

Q. Now --

A. Actually it's -- it's conservative, but yes.

Q. I -- I think you may hear SAP contend that if you're going to make more sales, in other words, 93 additional sales, you would have to lower the price. Let me ask you this: In the way you approach lost profits, do you agree with that criticism that you should have lowered the price to make these additional sales?

A. No, I don't agree with that, given the way I've done this.

Q. Okay. Tell us how you did it -- how -- how

your approach controls for the fact that if you want to make a ton of new sales, you're going to have to lower the price at some point and -- and tell me why you used an average rather than some kind of declining scale.

A. The 1.8 million figure that I used reflects Trilogy's actual license fee revenue associated with its actual real world customers when it had an exclusive between 1996 and 1998. So that number reflects what the market was willing to pay Trilogy for its Pricer functionality.

In -- in the -- in the damage period, we know that Trilogy had available to it a -- a base of more than 1,300 SAP customers who had access to the infringing functionality. My lost profits computation is limited to only 93 customers, less than -- less than 10 percent.

And so what I've done here is -- is allowed for the possibility that some of those SAP customers would not have been willing to pay 1.8 million for Trilogy's functionality; that is, they -- they drop out of -- of the computation. Had Trilogy -- had I used a lower price, I probably would have had additional lost sales to allow for the fact that other things equal, the lower the price, the greater the sales.

Here, I've basically not included any

sales that Trilogy would have made to those remaining SAP customers, a little short of 1,300 customers, on -- on the theory that they might not have been willing to pay 1.8 million. So I've allowed for the fact that other things equal, you make fewer sales at higher prices.

Q. Okay. And the market that -- the market from which you're claiming lost sales is -- is what, precisely?

A. It's -- it's the market that includes SAP customers, the 1,360 SAP customers who had -- who had --

Q. Well, let -- let --

A. -- the infringing --

Q. -- me stop you there.

A. -- technology. Yes, sir?

Q. I -- I probably asked a bad question.

Of all the 93 customers that you're claiming we lost, what do they -- what -- what characteristics do they have in common?

A. They -- they -- they want to have the -- the Trilogy Pricer product and they had access to it at SAP.

Q. Okay. And are all -- all the 1,360 customers you mentioned, did all of those actually buy SAP software?

A. They did.

Q. Okay. And within that 1,360, how many of those are Tier 1 SAP customers, the Fortune 500-type companies?

A. There were 480 Tier 1 -- Tier 1 SAP customers, of which 435 were available to Trilogy in the sense that Trilogy had not sold or had not licensed those customers.

Q. So there were 480 SAP Tier 1 customers total, but Trilogy had actually sold Pricer in the exclusive period to --

A. 55.

Q. -- 55 of those?

A. Yes, sir.

Q. Okay. And you're saying Trilogy would have been able to make an additional 93 sales --

A. Correct.

Q. -- to those type of customers?

A. Correct.

Q. And the period of time when it won the 55 customers, is that longer or shorter than the damage period?

A. That's shorter than the damage period.

Q. Okay. And so the damage period is about eight years?

A. Correct.

Q. And so you're saying over an eight-year period they'd have been able to make 93 additional sales to Tier 1 customers?
A. That's correct.
Q. And in the past they had made 55, about, some -- something like that?
A. Yes.
Q. Okay. And so you removed -- anybody that Trilogy had actually sold to in the past, you pulled those out of the available pool?
A. Right, because I assumed that those -- those customers already had a license from Trilogy and so those wouldn't be potential new customers, but there are still 435 Tier 1 SAP customers that are available to Trilogy.
Q. And so we know, all of those 435 customers have SAP software, right?
A. We do.
Q. And they're in Tier 1?
A. They are.
Q. Okay. And their -- in order to meet their pricing needs, is it fair to say they have two options, either SAP or something to bolt-on top of SAP?
A. Yes. They -- they were at SAP and so now they would need something to bolt-on; in this case Trilogy

had that product.

Q. And if there was some product in the market like an Oracle pricing functionality that I think the evidence has showed nobody would ever bolt-on top of SAP, would that be an acceptable or a viable alternative for these 435 Tier 1 SAP customers?

A. I don't believe so, no.

Q. Now, Let me ask you one more thing. In -- have you seen evidence in this case of the rate at which Trilogy was winning deals before the impact of SAP came around?

A. Yes, sir, I have.

Q. And what was -- what -- what is that evidence?

A. The evidence that I've seen indicates that Trilogy was converting on roughly 35 percent of its prospects; in other words, for roughly 1 in 3 times it went out and tried to do a sale, it would convert 35 percent success rate.

Q. And did you claim 35 percent of those 435 as lost sales?

A. No. If I had used 35 percent, it would have been more like something north of a hundred -- 140 or so lost sales would be a 35 percent conversion rate, and -- and my number is -- is only 93, which would be something in the 20 percent range.

Q. Okay. And so the evidence you've seen, Trilogy was winning deals at a 35 percent clip at a 1.8 million dollar price?

A. Correct.

Q. Is that -- how -- how does that impact your view that Trilogy would not have had to lower its price to make the 93 sales you believe they would have made?

A. I think my -- my -- my analysis here is consistent with that.

MR. COLE: Thank you very much, Mr. Weinstein. I'll pass the witness.

MR. MELSHEIMER: May we approach briefly, Your Honor?

THE COURT: Yes.

(Bench conference.)

MR. MELSHEIMER: Your Honor, I just would like to renew our Daubert motion on the lost profits issues that we raised, motion to strike this witness for the reasons outlined in our Daubert briefing that the Court has previously denied, but I wanted to renew it at this time.

THE COURT: Okay. I'll stick with my prior ruling.

MR. MELSHEIMER: I thought you might.

THE COURT: Okay.

MR. MELSHEIMER: Thank you.

(Bench conference concluded.)

THE COURT: Mr. Melsheimer, cross-examination.

MR. MELSHEIMER: May it please the Court.

CROSS-EXAMINATION

BY MR. MELSHEIMER:

Q. Good morning.

A. Good morning.

Q. Mr. Weinstein, you understand that SAP was determined to infringe three claims of the '350 patent?

A. That's my understanding, yes, sir.

Q. That's three claims out of 31?

A. I don't have the number of claims in mind, but I know there's been a finding of infringement.

Q. And you understand that it's -- it hasn't been determined that SAP's infringement was deliberate or willful, you know that, right?

A. As far as I know, that's true.

Q. And that means if it's not willful, that means it's not intentional; you get that, right?

A. That -- that -- I'm not an attorney, but I understand that, yes, sir.

Q. You know that SAP didn't even know about the '350 patent until 5 years after it was issued, right?

You know that?

A. I don't know that one way or another.

Q. That was 10 years after it was filed, if they found out about it?

A. That would be -- that would be roughly true --

Q. That's the math?

A. -- yes, sir.

Q. Now sir, I want to see if we can't agree on just a couple things. Have you ever heard the -- the statement that a patent is not a license to succeed. Have you ever heard that?

A. You know, I haven't heard that statement, but I'm comfortable with it.

Q. All right. You agree with it?

A. I'm comfortable with it.

Q. Because what it means is that just because you have a patent on something, whether it's a small thing or it's a big thing, that doesn't guarantee you success, fair statement?

A. Fair statement.

Q. What you get with a patent is you get the ability to exclude people for practicing whatever your patent covers, correct?

A. Correct.

Q. But you don't get the ability to guarantee your

own business success using that patent, fair?
A. Fair.
Q. All right. Well, with that in mind, I want to talk a little bit about some issues of timing, and I'd like to go through sort of a chronology with you. Are you with me?
A. So far.
Q. All right. So is it true, sir, that as early as March of 1998, Trilogy was immersed in a very competitive environment for its product?
A. I assume that there's always competition to some extent, although there's not a competition when you have a patent to the patented technology.
Q. Well, it's interesting you'd say that, because in 1998 Trilogy didn't have a patent, didn't have this '350 patent, correct?
A. Correct.
Q. All right. So we're talking about 1998, no patent, and you'd agree with me that Trilogy was immersed in a very competitive environment, right?
A. I'm -- I'm fine with that.
Q. So for example, if you look at Defendants' Exhibit 909, we saw this with Mr. Gupta, this was an e-mail that Mr. Liemandt sent to Mr. Gupta about Siebel or Siebel, right?

A. Yes.

Q. That was a competitor of Trilogy's in the software business at that time, correct?

A. As far as I know, yes, sir.

Q. And let's take a look at the little graph that Mr. Liemandt created. And he's the -- he's the CEO of the company, right?

A. Yes, sir.

Q. And he's evaluating the different facts of Siebel and he -- he asks who's their proposed prospect base? And he says, needs to slow them down -- sorry, need to stop them from buying Siebel. Slow down the cycle, FUD, cost pressure; did I read that right.

A. You did.

Q. Now, you've been involved in a lot of cases that involved anticompetitive conduct, haven't you, sir?

A. I have.

Q. And you know what FUD means?

A. I do.

Q. FUD means fear, uncertainty, and doubt, right?

A. It does.

Q. And it's a common term that is sometimes used to describe anticompetitive behavior to hurt or damage a competitor, fair?

A. Fair.

Q. And that's what Mr. Liemandt was proposing to do to Siebel back in 1998, because he found himself in a very competitive environment, correct?

A. That -- that's fair.

Q. And indeed, it's more than just that.

MR. MELSHEIMER: If you'd pull this back a little bit.

Q. (By Mr. Melsheimer) If you go down to the next bracket, who are people who have left Siebel in the past, and he says lots of people don't like Siebel, could be useful to build up network of Siebel haters who can provide information for us. Use the valley against them. This network can feed the negative hype. Do you see that?

A. I do.

Q. Is that consistent with a very competitive marketplace with respect to Siebel and Trilogy back in 1998?

A. Yes. It's consistent with the competition between Siebel and Trilogy, yes.

Q. And, in fact, Mr. Liemandt proposes or suggests that they go over the line.

MR. MELSHEIMER: Do you have that, Mr. Barnes?

Pardon me, Your Honor.

Q. (By Mr. Melsheimer) Well, in any event, Mr. Weinstein, maybe I can find that, but in any event, it wasn't just Trilogy that was competing against Siebel, other companies were competing against Trilogy as well back in 1998, correct?

A. I assume that's true, yes, sir.

Q. And, in fact, Trilogy was trying to do a lot to attempt to --

MR. MELSHEIMER: Let's go back to this slide for just a minute. It's Bates number 1087.

Q. (By Mr. Melsheimer) It talks about the marketing message they want to deliver back in 1998 to Siebel, and it's Bates number 1087 at the bottom. It's Page -- Page 1.

MS. SKINNER: Next to the last line.

Q. (By Mr. Melsheimer) Marketing message, this is going to be a frontal comparison oriented campaign. Like the old Oracle campaigns. Hard hitting, aggressive, willing to go over the line.

So they were willing to go over the line back in 1998, correct?

A. I see that.

Q. And that is the market, that is the characteristic of a very, very competitive marketplace; isn't that right?

A. It can be.

Q. All right. Now, SAP added this hierarchical access pricing feature back in 1998; is that correct?

A. That's my understanding.

Q. The '350 patent doesn't issue until 2003?

A. Correct.

Q. And even though Versata had other patents between 1998 and 2003, there's been no determination of infringement as to any of those, correct?

A. Correct.

Q. So there's been no patent infringement determined with respect to anything SAP did between 1998 and 2003, do I have that right?

A. You do, sir.

Q. You also know that there's been no determination that SAP took any trade secrets or confidential information when they added hierarchical access in 1998, right?

A. As far as I know, that's correct.

Q. There's been no determination that SAP misused any confidential information belonging to Trilogy when it added hierarchical access in 1998, correct?

A. That's as far as I know, that's true.

Q. No determination that SAP took any of Trilogy's software code, right?

A. Correct.
Q. Because you know that SAP wrote its own code, right?
A. Yes.
Q. They did their own work, right?
A. As far as I know.
Q. So what was happening between SAP and Versata between 1998 and 2003 has never been determined to be anything other than one thing; isn't that right?
A. I'm sorry?
Q. It hasn't been determined to be anything other than fair competition; isn't that right?
A. As -- as far as I know, that's -- that's correct.
Q. All right. Now, we're supposed to look at, as I understand it, what would have happened in the absence of SAP's infringement starting in April of 2003, right?
A. That's fair.
Q. Another way of saying that is but for. So but for the infringement in April 2003, what would have happened, right?
A. Correct.
Q. To figure that out, let's take a look at what was happening between 1998 and 2003 to see what the landscape would look like when we start in 2003. Is

that a fair way to do it?

A. Well, you can do that.

Q. Well, in fact, you did that, you did that in calculating damages, because when you say the kind of sales that Trilogy would have made and the prices they would have gotten, you actually look at the 1998, 1999 time frame; isn't that right?

A. Well, I -- I make my calculations based on the actual experience 1996 to 1998.

Q. So you go back before there was any patent infringement and you look at what was going on in '96 and '97 and '98, fair statement?

A. I do that.

Q. All right. So let's take a look at what was happening in at -- in at least the end of that time frame you looked at. In 1998, Trilogy attempted to sell Pricer to 40 SAP and Oracle customers, but all but one wasn't interested; isn't that right?

A. I think I remember a document while I've been sitting here in that -- in that regard.

Q. Well, let's take a look at Exhibit 514. And we've seen this before and this is a Trilogy document that I believe Mr. Dholakia talked about, but it says: The SC Pricer team has met with over 40 SAP and Oracle companies. Only one of these companies has subsequently

purchased the software, right?

A. That's what it says, yes.

Q. Now, help me with some math. You said that you'd heard that Trilogy's success rate was 35 percent, right?

A. I saw that, yes.

Q. Right. Did you see that their success rate was actually 2.5 percent?

A. I -- I did, yes.

Q. Okay. Have you done the math on this? Is one out of 40 a success rate of 2.5 percent?

A. It is.

Q. All right. And it says in this document that Pricer had failed to reach the mainstream, right?

A. That says that, yes, sir.

Q. SC Pricer has failed to reach acceptance of the mainstream after eight months of working the market?

A. That's what it --

Q. Right?

A. -- says, yes, sir.

Q. It turns out, doesn't it, Mr. Weinstein, that Trilogy had made some bad assumptions about the marketplace, right?

A. Well, it -- it -- it had not assumed that SAP had its functionality, that's true.

Q. Well, now let's talk about that for a second. Back in 1998, this was not Trilogy's functionality, true or false?

A. Well, Trilogy didn't have its patent yet, so that's --

Q. They didn't --

A. -- true.

Q. -- own it?

A. Excuse me?

Q. They didn't own that functionality in 1998?

A. That's true.

Q. And in 1998 they couldn't prevent anybody in the world from doing it, true statement?

A. As far as I know, that's correct.

Q. All right. So it's -- there's no patent in 1998 and there's nothing but fair competition going on. But let me ask you this: Assumptions -- if you make bad assumptions, you're going to end up potentially with bad conclusions, fair?

A. Fair enough.

Q. Fair to say, and I'm not fussing at you, but you've made some assumptions here, right?

A. I have.

Q. Right. And if your assumptions turn out to be incorrect, your conclusions could be incorrect, fair?

A. That's fair.
Q. That's true with any expert, right?
A. You know, I won't speak for everybody, but that's certainly true, yes.
Q. Makes sense?
A. It makes sense to me.
Q. And we know that Trilogy made some bad assumptions?
MR. MELSHEIMER: Let's go to Page 3 of Exhibit 514.
Q. (By Mr. Melsheimer) Back in 1998 they concluded that the Pricer team inaccurately assumed that the majority of SAP customers needed enhanced price execution capabilities. The market has indicated otherwise, right?
A. I see that.
Q. So they thought one thing, but the truth turned out to be something else, right?
A. Well, that's not -- no, that's not right, sir.
Q. All right.
A. That's incorrect.
Q. Well, they -- let me put it to you this way: They assumed that the majority of SAP customers needed enhanced price capabilities and what this document concludes is, is that the market has indicated

otherwise. That's what it says, right?

A. That's what -- that's what it says.

Q. Now, in addition, prior to 2003, prior to the issuance of the patent, some of Trilogy's own employees realized that a hundred thousand dollar price would be a better price, a more reasonable price, a more sensible price than the $1.8 million price tag they were trying to charge, right?

A. I think I recall that, yes.

Q. And that's this same exhibit, 514. If the product cost $100,000, the Pricer sales team believed that the conversion rate would increase 20-fold. So if it was $100,000, they might be able to sell a lot more, right?

A. Fair enough.

Q. And other folks actually suggested that the price that they needed to sell the software at was not a million eight, was not 100,00, but was in fact $50,000; you've seen that as well, haven't you?

A. I have.

Q. That's exhibit DX811 at Page 3. Let's take a look at that. Value proposition. We went in with a single price point with a value proposition of easier maintenance, better performance, greater flexibility. Not compelling at 1 million, right?

A. That's what it says.
Q. Though it was at 50?
A. That's what it says.
Q. That is a basic economic principle, isn't it, Mr. Weinstein, that sometimes people will not pay a hundred dollars for something but if it's $10 they might buy it?
A. That's fair.
Q. That is the standard economic principle of demand, the demand curve, right?
A. It is.
Q. Demand curves, they slope downward like this, right?
A. They slope downward.
Q. Generally, and they can have different, I don't want to overgeneralize, but the point is the more expensive something is, the less of it people buy, it's a general proposition, right?
A. Yes, it is. That's correct.
Q. Now, you assumed in your analysis that every customer would pay 1.8 million, right?
A. Well, I assumed that the 93 customers would pay 1.8 million. I also assumed that there were more than 1,200 customers who were available who were not willing -- who would not have been willing to pay that

much. So I allowed for that downward sloping demand curve.

Q. Make sure I understand your answer. For every of those 93 customers that you claim would have bought Pricer, in your calculation you have them paying a million eight, true or false?

A. True.

Q. Now, can we agree that back in the late '90s and early 2000s that the Trilogy customers that they were getting thought the product was too expensive, right?

A. You know, I don't know that that's true for all Trilogy customers. I -- I wouldn't be surprised if it's true for some.

MR. MELSHEIMER: DX Exhibit 859, Page 111.

Q. (By Mr. Melsheimer) This was this customer satisfaction survey that Trilogy commissioned back in 2000. You've seen it, right?

A. I have.

Q. Did you look at it in forming your opinions in this case?

A. You know, I don't recall if I saw it before the --

Q. All right.

A. -- trial or not.

Q. Well, it says here one of the conclusions they reached was that it was very -- that customers felt like Trilogy was very expensive and they hadn't delivered, right?

A. That's what it says.

Q. And there were a number of comments offered, they oversold the software; very expensive; very expensive; not getting value for the money that we spend; we paid too much for quality out of the box; We spent millions and we're still trying to implement.

Here's a good one, the consultants are great. The product has some issues. They're expensive. With all the problems they bring talent and expertise you can't get from others. That's positive. But what's the last one?

A. You want me to read it?

Q. Please.

A. Extremely overpriced for the level and skills of the consultants.

Q. In addition to being very expensive, Trilogy's customers expressed dissatisfaction to the tune that 57.5 percent of the customers thought that the product did not meet their expectations, right?

A. I recall seeing that, yes, sir.

Q. Let's just be clear about that number, and I

want to compare it to some of your numbers.

That number is an not estimate, is it?

A. Well, we'd have to go back and look at it, sir.

Q. That number is not a projection is it, sir?

A. You know what? We'd have to go back and look at it.

Q. That number is based on work that was actually done by a consulting firm back in 2000 to go out and interview and collect data about actual customers. You know that, don't you?

A. I do recall that, yes, sir.

Q. Now, that's different from what you did in this case, right?

A. In what sense?

Q. Well, you didn't go out and do any of your own work and research in the marketplace. You looked at Trilogy's documents and SAP's documents, fair?

A. Well, I looked at Trilogy's actual experience and SAP's actual experience, that's true.

Q. You didn't go out and do your own homework in the marketplace like that survey company did, fair?

A. No, that's not fair.

Q. Okay.

A. I relied on actual marketplace results, which is a stronger place to go than a survey.

Q. That wasn't my question, sir. You didn't go out -- make it simple. You didn't go out and do your own survey, right?
A. I -- I surveyed Trilogy and SAP's actual results, yes, sir, I did.
Q. You didn't go out and conduct your own independent market research outside the Trilogy and SAP documents, fair?
A. That's true.
Q. Sir, did you know -- so we had all these customer issues, these customer complaints, too, expensive, overpriced, not good value. You've also seen documents -- we'll talk about these -- where there were problems with software, right?
A. I've seen some, yes, sir.
Q. And, in fact, it turns out that the folks at Trilogy weren't even using Pricer in their own company. Did you know that?
A. I don't think I knew that till the trial.
Q. Yeah. That just came out in the trial that the product that they're trying to get nearly $300 million in damages from SAP, they weren't even using it in their own company; isn't that right, sir?
A. As far as I know, that's true.
Q. Let's talk about lost customers.

Now, it turns out that the dissatisfaction that customers had with Trilogy actually led to some people canceling agreements prior to 2003. You've seen that, haven't you?

A. You know, I don't -- I don't recall that, but I would accept that as a possibility.

Q. Well, let's take a look at Defendants' Exhibit 497.

Thomas & Betts. This is from a Trilogy document, 497 at Page 42 at the bottom. This is a client that Trilogy had that said -- boy, if you can read that, I won't ask you a single other question.

A. Can I take a shot?

[Laughter]

Q. (By Mr. Melsheimer) Let me take that back.

THE COURT: Give it your best shot.

[Laughter]

A. Thomas & Betts say they will not pay this maintenance. It will take legal action to collect.

Q. (By Mr. Melsheimer) All right. Well, I'm going to stick at it, sir. I'm going to stick at it.

But the fact is, what it says is that they wouldn't pay the maintenance, and Trilogy was going to have to sue them to get it, right?

A. That's what it says, yes, sir.

Q. And you don't dispute that Versata lost a 15-million-dollar deal to Lucent in 1998 due to what the president of Trilogy called Trilogy's arrogance and incompetence.

You've seen that, haven't you?

A. You know, I don't recall it, but I accept it.

Q. All right. Well, let's take a look at it. I appreciate you accepting it. I want to make sure that you appreciate that I'm -- I'm using their own documents here.

So Lucent, 15-million-dollar deal. Our arrogance and incompetence caused us to lose this.

That's Exhibit 824, all right?

A. I see that, yes, sir.

Q. And there are other examples of companies pulling out of or canceling their business relationship with Trilogy that we don't even -- we don't need to go into all of them, do we, sir?

A. That's up to you, sir.

Q. All right. Now, you understood that because of all these problems that Trilogy was having, that some people at Trilogy had concluded that Pricer was dead even before the patent issued in 2003; isn't that right?

A. I recall that.

Q. Take a look at Defendants' Exhibit 3105 at Page

3. This is an e-mail chain from some people within Trilogy.

My understanding of the problem is that while Trilogy pricing is a nice-to-have feature, it very rarely drives the sale on its own.

Do you see that?

A. I do.

Q. What that means is, is that the people who were buying from Trilogy, many other software products they sold, right? It wasn't just this one.

A. Correct.

Q. That when people were coming to Trilogy to purchase something, at least from this gentleman's perspective, Mr. Buerkle, who was a long-time Trilogy employee, that it was a nice-to-have feature that rarely drives the sale, meaning that people don't -- don't buy anything from us just because of Trilogy -- just because of Pricer, correct? That's what that means.

A. It says that rarely occurs, yes, sir.

Q. And then he says that: Face it. For as cool as we all know pricing to be, if there isn't a steady pipeline of sales, it's dead, right?

A. That's what it says.

Q. And this was way back in 2000, three years before the patent, right?

A. Correct.

Q. Now, as a result of all these issues, Trilogy's revenues started to drop well before the patent issued in 2003, correct?

A. Well, Trilogy's revenues dropped during that period, yes, sir.

Q. All right. In fact, you say this in your report, that in 2001, there were layoffs at Trilogy and that the layoffs occurred during a period of revenue decline. Do I have that right?

A. You do.

Q. Now, all this is happening as we're talking about the notion that some people at Trilogy thought Pricer was overpriced, the lack of customer satisfaction to the extent of them canceling or refusing to pay, the drop in Pricer revenue, and Versata employees saying that Pricer might be dead, all that occurred before 2003, right?

A. Correct.

Q. And there's no infringement before 2003, right?

A. Also correct.

Q. Now, you understand that if -- that it's SAP's view in this case, why we're here, is that the dropoff in sales of Pricer was due to Trilogy's own actions, their own decisions, their own issues, changes in the

overall marketplace -- they have nothing to -- that we're not faulting them for -- and that that's what caused the dropoff in Pricer sales, not anything SAP did.

You understand that's the -- that's the issue we're joining here, right?

A. Well, I understand that to be the essence of SAP's position, yes, sir.

Q. All right. But -- we're going to talk about that in a minute, but whatever is going on in the problems, the dropoff of sales, the issues with Pricer, the technology issues, the changes in the marketplace, all that happened before 2003, that cannot be the basis for any damages in this case.

You know that, right?

A. Correct.

Q. Let's talk a little bit about what happened when Trilogy got the patent in 2003.

Now, is it -- you know that since Trilogy was issued the '350 patent in April that it hasn't sold Pricer to a single new customer.

You know that, don't you?

A. As far as I know, that's true, yes, sir.

Q. I mean, you checked that out, didn't you?

A. I did.

Q. I mean, you looked because if there had been a new sale of Pricer since the patent issued, you would have come in and told the jury about it, right?
A. Well, I don't know how it would have fit, but, yes, I did check that out. And as far as I know, there are new sales.
Q. And Trilogy -- and you know this, too -- that Trilogy is not aware any of document indicating that the failure to sell Pricer after April of 2003 was in any way related to SAP's hierarchical access pricing capability, right?
A. You know, I can't speak to that. Certainly, my -- my expert report and conclusions are that Trilogy's lost sales are attributable to SAP's infringement.
Q. Well, that's your opinion, right? I'm asking you about the documents from Trilogy's side.
Isn't it true, sir, that Mr. Smith, that gentleman right there at the table, that he has testified that no prospect that ever considered purchasing Trilogy's software has ever said to Trilogy: We didn't go with Trilogy, because we're going to use SAP's hierarchical access instead?
And he said: I don't believe I've ever seen any documentation like that, no.

Do you recall looking at that?
A. If he said it, I would have seen it, yes, sir.
Q. Now, in your analysis, this but-for analysis of -- starts in April of 2003. We look at the world starting in April 2003 after Trilogy got the patent. And we look at what would have happened if there -- if SAP hadn't added this feature to its product, right?
A. Correct.
Q. So we sort of assume -- assume something away in a sense, because we know SAP had added the feature five years earlier, right?
A. Correct.
Q. But we don't assume away, we don't assume away all the issues that Trilogy faced in the preceding year, correct? We don't just erase those, do we?
A. We don't.
Q. We don't just erase all the issues that customers raised about the price of the software, right?
A. Correct.
Q. We don't just erase all the complaints that the customers had about the technology, right?
A. Also true.
Q. We don't erase all these concerns that were percolating, whatever you want to say, within Trilogy prior to 2003 that we've gone on in some detail with

this jury since Monday, right?

A. Correct.

Q. And we don't assume away all the competition in the marketplace that grew up between 1998 and 2003. We don't just assume that away, do we, sir?

A. We do not.

Q. And you know that something else we don't assume away is, we don't assume away technological changes that may have occurred between 1998 and 2003, right?

A. That's true.

Q. Because it's possible, and you've seen this happen, where changes in the technology in the marketplace can affect the value of someone's invention, right?

A. Correct.

Q. You might have a real good invention that's worth something in one year, and five years later, it's not worth much of anything. You've seen that happen, haven't you?

A. That can happen.

Q. All right. Let's talk about these Panduit factors.

You recognize that these Panduit factors are the legal standard for the recovery of lost profits,

right?

A. I do.

Q. And is it your view that in order for Trilogy to get lost profits, they have to satisfy one way or another each of those factors?

A. As far as I know, that's required.

Q. If they fail to prove even one of those factors, they're not entitled to lost profits, right?

A. Well, you know, I can't speak to that. I'm here as an economist.

Q. Well, let's put it this way: There's four factors. You're not suggesting, well, if you only meet three, you reduce the damages by 25 percent, right? You're not saying that.

A. I haven't said that, no, sir.

Q. Okay. And the fact is that if -- if you can't -- if the jury -- if Trilogy can't prove that the reason why its sales dropped off was because of SAP's determined infringement, they don't get any lost profits, right?

A. You know, I don't think I put it quite that way.

Q. Let me -- okay. Let me rephrase it.

You understand that Trilogy has the burden of proof in this case, right?

A. As far as I know, that's true.
Q. Well, now, why -- I mean, there's no doubt in your mind about that, right?
A. Well, sir, you know, I'm here as an economist, not as an attorney. As far as I know, that's true.
Q. As far as you know, they bear the burden of proving lost profits and satisfying the Panduit factors, correct?
A. As far as I know, that's true.
Q. And if they can't satisfy that, they're not entitled to lost profits as far as you know?
A. As far as I know.
Q. Because you're not offering any other theory of damages in front of this jury, correct?
A. That's true.
Q. You know that Mr. Wagner is offering the notion that Trilogy should receive a reasonable royalty, correct?
A. Correct.
Q. That's different from lost profits, right?
A. It is.
Q. You don't have to prove in a reasonable royalty, for example, that you lost business, right?
A. There are different -- different approaches to the two computations, yes, sir.

Q. Listen to my question.

You don't have to prove for -- to get a reasonable royalty that you lost a dime's worth of business; isn't that right?

A. Well, that might be relevant to the royalty computation, so...

Q. Might be relevant, but you don't have to prove it.

A. It could be relevant, that's correct, but you don't have to prove it.

Q. And you're not doing that analysis.

A. A royalty analysis?

Q. Correct.

A. I am not.

Q. All right. Let's take a look at Panduit Factor No. 1. To satisfy this first one, I think you said that Trilogy must show that there was a demand for the patented feature, right?

A. Correct.

Q. Now, you rely in your report on a couple of things to prove that.

Mr. Weinstein, let me hand you --

MR. MELSHEIMER: May I approach, Your Honor?

THE COURT: Yes.

Q. (By Mr. Melsheimer) Now, in your report --
A. Sir?
Q. Take a look at paragraph -- I'm sorry. You --
A. Sir, with due respect, I think you gave something you didn't intend to.
Q. Okay. Let's see.
A. It's your cross-examination.
Q. It's a list of my questions?
A. It is.
[Laughter]
Q. (By Mr. Melsheimer) Why don't we slow things down. You give me your answers in advance, and I'll make the trade with you, sir.
All right. Can you turn to Page -- Paragraphs 182 and 183 of your report in Defendants' Exhibit 2630?
A. Okay, sir. I have it.
Q. Now, 182 and 183 deal with your findings about the demand for the patented feature, correct?
A. Yes, that's true.
Q. And let's just be clear. You don't dispute that this feature, this pricing feature, is not the basis of demand for SAP's products, right?
A. That's true.
Q. Right.

A. I agree with that.

Q. It is not the basis -- put it another way. This hierarchical access feature, this one way of doing pricing out of a dozen ways, that is not the reason why people buy SAP's big suite of software, correct?

A. Yes, sir, that's correct.

Q. And you also agree, wouldn't you, that your lost profits calculation doesn't have anything to do with whether any customers actually configured the software in a way that infringes the patent, right?

A. That's correct.

Q. The patent here is just a capability. I know that's a strange concept, but it's the capability of doing something in the software whether or not a customer actually ever does it, right?

A. Yes, sir.

Q. So it's a little bit like -- do you ever use Word, Microsoft Word?

A. I do.

Q. Do you ever notice on those fonts, the different fonts you can use, there are hundreds of fonts, Helvetica, Graphic, New Times Roman, all that stuff, right?

A. Correct.

Q. And do you use all hundred of those?

A. I do not.
Q. And, in fact, you've got the capability of using all of them, right?
A. I do.
Q. Because they're in the code, but you may not -- you may not have used one or more of them even one time in your many, many years of using the software program, right?
A. Correct, but I'm happy to have the capability.
Q. You like to have it in there.
A. Correct.
Q. You're not going to give me an opinion, though, of how much you'd be willing to pay for Helvetica 20?
A. I'm not.
Q. Okay. Or old world gothic?
A. Correct.
Q. All right. So that stuff that Mr. Bakewell testified to with respect to that survey, that so-called survey from the depositions, that didn't actually matter to any of your conclusions, because your lost profits conclusions don't hinge on whether anyone actually ever used the software feature at SAP.
Do I have that right?
A. Well, the specific calculations don't, but I certainly had those survey results in mind when I did

them.

Q. But whether the surveys had said 10 percent or 40 percent or a hundred percent, you don't use that survey to calculate the $280-something million you say are owed in lost profits.

Do I have that right?

A. I have the survey results in mind, but it doesn't enter specifically into the computation, that's true.

Q. Meaning, if the survey had been totally different, say -- let's say the survey showed that 1 percent of people use the feature, you'd still have the same number, wouldn't you?

A. Well, if it said 1 percent, I might have thought about my number, but it didn't say 1 percent.

Q. Right. And you -- consistent with your testimony about this feature not being the basis for customer demand, you can't point to any hard evidence that proves that SAP adding this feature increased sales or increased demands for SAP products; isn't that right?

A. That's not right, sir.

Q. Let me ask it again.

Have SAP's revenues or profits -- you can't -- you don't know if SAP's revenues or profits have increased as a result of the infringement of the

'350 patent. You don't know.
A. I haven't measured that, that's true.
Q. You don't know, right?
A. You know, I don't agree with that.
Q. All right.
MR. MELSHEIMER: Can we have the clip, Mr. Barnes?
(Video playing.)
QUESTION: My question is: Have SAP's revenues or profits increased as a result of its infringement of the '350 patent?
ANSWER: I -- I don't know.
(End of video clip.)
Q. (By Mr. Melsheimer) All right. You told us in your deposition that you didn't know, correct?
A. Correct.
Q. All right. Now, let's talk about non-infringing alternatives, because I'm -- I'm -- if I start to speak quickly, it's because I've been told I'm running out of time, sir. So I'm going to try to go as quickly as I can.
Now, non-infringing alternatives are -- is an important component of the -- your lost profits analysis, right?
A. It is, yes.

Q. If I -- make sure I understand it. If customers could have chosen other products other than SAP's product that was determined to infringe, if they could have gone elsewhere for their needs, then that may mean that Trilogy wouldn't have gotten those sales.

Do I have that right?

A. That's true.

Q. And it's important to really understand that, because that's part of this but-for world. Because if -- if Trilogy wouldn't have made these sales, even if SAP hadn't added the feature, then they don't get lost profits, right?

A. That's fair.

Q. You understand that Trilogy bears the burden of proving that there weren't other non-infringing alternatives, correct?

A. As far as I know, yes, sir.

Q. But in this case, you didn't -- you personally did not analyze this -- the existence of non-infringing alternatives. You did not evaluate other products that customers could have bought to perform the pricing; isn't that right?

A. I assumed there were no acceptable -- commercially acceptable non-infringing alternatives, that is true, yes, sir.

Q. You assumed it -- now, make sure I understand. Assume means you just took it as a fact, right?

A. I took it based on other information that was available to me, yes, sir.

Q. You didn't do the work to -- you didn't do a work -- you did not do the work to determine if there were commercially acceptable pricing solutions that did not practice the claims of the '350 patent; isn't that right?

A. Well, I did the work that I've described in this case, and that includes looking at that issue.

Q. You remember your deposition, Mr. Weinstein --

A. I do.

Q. -- in this case?

A. I do.

MR. MELSHEIMER: Let's take a look at a clip, 66, 15 to 22.

(Video playing.)

QUESTION: In those two paragraphs, I don't see an analysis of whether, in the infringement period, companies, other than Trilogy or SAP, offered commercially acceptable pricing solutions that did not practice the asserted claims of the '350 patent.

Have you done such an analysis?

ANSWER: I have not.

(End of video clip.)

Q. (By Mr. Melsheimer) And, in fact, sir, you relied -- and you don't believe that Mr. Gupta has done such an analysis either, or certainly you didn't think that when you did your report in this case, correct?

A. Well, I'm aware of his -- of his testimony. That much is true.

Q. But when you did your report, you understood that Mr. Gupta had not rendered opinions in his report about whether or not there were acceptable non-infringing alternatives, correct?

A. I think his opinions were -- that I recall were limited to the question of whether SAP's patch in 2010 was a non-infringing.

Q. But that's not the only issue, correct?

A. Correct.

Q. You have to look at what else was out there in the marketplace. And let's do that.

You know this company, Gartner, sir?

A. I do.

Q. You've heard about them?

A. I do.

Q. They're very knowledgeable about the marketplace?

A. They are.

Q. Well, let's see what Gartner is saying about the marketplace in 2002, a year before the patent issues.

And this is Exhibit 1596. And we've seen this before, sir, and this is a -- this is a sales configuration and pricing quadrant, and it talks about the different companies that are involved in this market, product and pricing -- some companies provide product and pricing configuration; some companies provide pricing configuration only. And then here's all the competitors in that marketplace, right?

A. Yes, I see that.

Q. And there are many, many other companies, other than SAP, in this marketplace, correct?

A. There are.

Q. You've got companies like -- and let's just take the 1s -- well, the 1s or the 2s, because the 1s provide pricing configuration, and the 2s just provide pricing. But you've got Siebel. We know Siebel is out there competing, right?

A. We do, yes, sir.

Q. And we actually know that Siebel was such a big deal to Trilogy that back in 1998, Mr. Liemandt wrote that e-mail saying: We've got to do everything we can to hurt them, right?

A. We saw that, yes, sir.
Q. We know that other companies are out there competing. You've got Oracle, right?
A. I see.
Q. You got SAP, to be sure.
A. I see that.
Q. You got Trilogy. And then you've got maybe a dozen other companies; isn't that right?
A. Correct.
Q. Now, sir, you have done this lost profit analysis before, haven't you?
A. I have.
Q. You've done it in other lawsuits.
A. Correct.
Q. And in a lawsuit a few years back, you swore under oath that the presence --
MR. MELSHEIMER: Leave that up, please, sir.
Q. (By Mr. Melsheimer) -- that the presence of multiple non-infringing alternatives creates a real doubt as to whether the -- the patentee, the person that had the patent, could make sales but for the infringement.
A. I agree with that.
Q. You have previously sworn under oath that if

there are other people in the marketplace that are selling a product that companies could buy instead of SAP's product, that that means that the patentee, Trilogy in this case, that they wouldn't have gotten those sales, they wouldn't have lost the sales, because the -- sorry -- they wouldn't have gotten the sales because the sales would have gone to all these other companies in the marketplace, right?

A. Well, there's one part of your question that's technically not right, but, generally, the presence of non-infringing alternatives will impact the lost profits computation. I do agree with that.

Q. Because -- and, again, you don't -- it is an economic point, but I just want to make sure it's real clear. It's because, if there's other substitutes out there, if you can go to -- if Chile's closes, but you can go to Applebee's or you can go somewhere else, those are other alternatives, right? That's what we're talking about.

A. That's correct.

Q. I want to talk real briefly about this issue -- I'm going to skip No. 3, sir, Panduit Factor No. 3. We're going to talk about No. 4, the amount of profit. Just a couple of real quick questions about that.

Profits are not the same as revenue. I

think you said that in your direct examination, right?

A. That's true.

Q. Profits are whatever is left over after cost, right?

A. Correct.

Q. And you're saying that you came up with this 72 percent profit margin that basically says, for every 1.8-million-dollar sale, that Trilogy is going to get to keep 72 percent of that.

A. That would be the profit, yes, sir.

Q. You base that not on looking at all the financial data at Trilogy for all their customers, right?

A. That's true.

Q. You based it on just looking at the expense experience and the profitability experience with their top 10 customers, right?

A. Correct.

Q. And the reason why you did that or the basis for your doing that or the source of you doing that is this gentleman right here (indicates); isn't that right?

A. I spoke with him about that, yes, sir.

Q. Mr. Smith is the one that directed you to that chart that showed the top -- the revenue experience and the profitability experience for Trilogy's top 10

customers, right?

A. Yes, sir.

Q. That's not something that you sat down and said: Okay. When I do this report independently, here's what I want to know. You went to Mr. Smith, and he directed you to this top 10, correct?

A. No, that's not correct.

Q. Well, he directed you to the top 10, didn't he?

A. Yeah. But first I told him what I wanted to know.

Q. All right. You told him to take out all the other Trilogy customers besides the top 10?

A. You know, I didn't -- I didn't put it that way, no, sir.

Q. Right. You didn't tell him to take out all the other Trilogy customers other than the top 10.

A. No. What I -- what I told him is, I wanted cost experience that would be relevant to the computation I did, which involved lost -- lost -- lost sales, lost customers.

Q. So you told him: I'm doing a lost sales -- a lost profits calculation. Can you give me the information that would be relevant to that?

A. In so many words, yes, sir.

Q. All right. And you -- you chose that top 10

instead of their whole customer base based on the conversation with Mr. Smith, right?

A. Ultimately, that's correct.

Q. All right.

MR. MELSHEIMER: May I have a moment, Your Honor?

THE COURT: Yes.

(Pause.)

MR. MELSHEIMER: I'm eight minutes over, Mr. Weinstein.

Q. (By Mr. Melsheimer) All right. Just a couple of questions. I just want to talk about -- and again, you used -- we talked about this earlier. We used 1.8 million, even though there were documents showing, within Trilogy, that they concluded way back in 1998, 1999, that a price point of 50 or a hundred thousand dollars might be more appropriate, right?

A. Yes. We've been through this.

Q. All right. Now, just a couple of things about Trilogy today or Versata today, because I don't want the jury to be left with a wrong impression.

Versata is not out of business, right?

A. Correct.

Q. They're a big business. They have a substantial amount of business, right?

A. As far as I know, yes, sir.
Q. They have offices in Austin, right?
A. Yes, sir.
Q. India?
A. So I've heard, yes.
Q. They do a lot of their software development in India?
A. As far as I know.
Q. And they do some work in China?
A. Also true.
Q. And they are still out there selling products in the software market as we sit here today.
A. Correct.
Q. All right.
MR. MELSHEIMER: Thank you, Mr. Weinstein.
THE COURT: Redirect?
MR. COLE: Yes, Your Honor.
Mr. Diaz, can you put Slide 16 up?

REDIRECT EXAMINATION

BY MR. COLE:
Q. Mr. Weinstein, I think one of the points Mr. Melsheimer made was that starting in 2003, when the patent issued, that Trilogy had not made a single new sale of Pricer since then.
Do you recall that?

A. I do.

Q. And I think the implication was, clearly, once we had our patent, we should have been able to start making sales again. Is that how you took it?

A. I took it at face value.

Q. Okay. Well, let me ask you this: From the period of 2003 until today, has SAP ever stopped selling its infringing product?

A. No.

Q. How many customers has it sold the infringing product to during that period?

A. 1,360.

Q. And does the fact that SAP is selling the infringing product to the same customer base Trilogy had targeted, did that affect potentially Trilogy's ability to sell?

A. Of course, since they're competitors. If SAP is giving it away and including it in its software packages, it affects Trilogy's ability to sell.

Q. And there was a discussion about demand curves. If you're a Tier 1 customer and you already have SAP, you have SAP software, and you have the infringing features for no additional charge, what does the -- what does the law of economics say about what you'd be willing to pay Trilogy for that same technology on top

of it?

A. Well, if you -- if you already have it, you're not prepared to pay for it again.

Q. And I think there was also a lot of discussion about this period here where the sales started to drop off, and I think Mr. Melsheimer showed you a bunch of the same e-mails we've seen previously.

Do you recall those?

A. I do.

Q. And he mentioned that the market then was highly competitive, right?

A. He did.

Q. Was the market highly competitive in 1995, 1996, and 1997?

A. Sure. It's the same thing. There's competition throughout the period, including the period during which Trilogy actually made the sales of Pricer-isolated contracts that I used as the basis for my comp -- computations.

Q. So Trilogy wasn't selling Pricer in a market in -- here in the early '90s when there was nobody else around, were they?

A. Correct.

Q. And was there competition in '98?

A. There was.

Q. And was there competition all the way till today --

A. Correct.

Q. -- in some form or fashion?

A. Correct.

Q. There's also been a lot of discussion about -- I don't think Mr. Melsheimer asked you about this, but there's been a lot of discussion about integration difficulties Trilogy was having with SAP.

Do you recall that testimony?

A. I do.

Q. Was integration with SAP easy in 95, '96, and '97?

A. No. You'd have the same kind of difficulties and complications during the period that Trilogy successfully sold Pricer as you would subsequent thereto.

Q. In doing causation analysis like this, have you ever heard the term background noise?

A. I have.

Q. And what does that mean?

A. That means there are other things going on simultaneously in the background.

Q. Okay. And if the background noise is consistent, does that indicate a causal relationship?

A. Well, the -- the background noise is going on during the early period, and it's going on during the infringement period. The only thing that's different is that during the infringement period, SAP is selling Trilogy's product.

Q. Okay. And let me shift gears briefly and address one point that he made.

Now, he noted, of course, that the patent didn't issue until here (indicates), and so this is fair competition; is that right?

A. Yes.

Q. Okay. And I think what he means by that is, it's non-infringing because the patent hadn't issued.

A. Correct.

Q. Does that mean Trilogy didn't own their software product?

A. No.

Q. Does that mean Trilogy didn't own the ideas and the work Mr. Carter had done?

A. Correct.

Q. Does that make it public property --

A. No.

Q. -- that anyone can take?

A. No. Trilogy still has it.

Q. Okay. I mean, Trilogy couldn't sue them at

that point for patent infringement, though, could they?

A. Correct.

Q. All right.

MR. COLE: Your Honor, can we approach briefly?

(Bench conference.)

MR. COLE: One of the criticisms Mr. Melsheimer levied is that he did not do -- go out beyond the Trilogy and SAP documents to do research. This brings up the subject of our attempt to subpoena SAP customer documents to assess the extent of use and demand for the product.

We believe that's opened the door to discuss the fact that we tried to do that but were blocked by SAP and limited to the depositions on written questions.

MR. MELSHEIMER: Your Honor, it's the same kind of research that --

THE COURT: Go with my prior ruling.

MR. MELSHEIMER: Okay.

THE COURT: Proceed.

(Bench conference concluded.)

Q. (By Mr. Cole) Let me address one other topic, different topic now?

Mr. Melsheimer made the point that Trilogy

doesn't use Pricer to sell its own products and that that must mean it's not very valuable.

Do you recall that?

A. I do.

Q. Now, the contracts you looked at, were those contract -- did those contracts have the prices set by a computer system, or were they individually negotiated deals?

A. As far as I know, they were individually negotiated.

Q. I mean, I know you're not a technologist, but does it make sense to use a computerized price execution system to set a price that's negotiated individually by two companies over a period of months?

A. Well, I assume not.

Q. All right. Next topic.

One of the documents he showed you was discussing some problems with Lucent. And I think the document said that our arrogance and incompetence had caused us problems.

Do you remember that?

A. I do.

MR. COLE: Could we have Slide 16, Mr. Diaz?

Q. (By Mr. Cole) Now, that customer was Lucent.

Do you see Lucent here in 1997, four from the top?

A. I do.

Q. So Trilogy actually won Lucent as a customer.

A. It had Lucent as a customer, yes.

Q. And did you recall Mr. Smith's testimony yesterday that Lucent is a customer of Trilogy's today?

A. Correct. I do.

Q. And Mr. Melsheimer correctly pointed out that we are not contending that customers that SAP won in the damage period bought SAP specifically because of hierarchical access as distinct from the other things in their product; is that right?

A. Yes, sir.

Q. Now, is it your contention that the lost sales Trilogy had would never have bought SAP; they would have bought Trilogy instead of SAP?

A. No.

Q. Okay. What's your contention?

A. I assumed that many of those customers would have purchased SAP product as well.

Q. Okay. We've heard the term bolt-on?

A. Yeah. Trilogy -- Trilogy -- the Trilogy Pricer product would have been bolted on to SAP.

Q. Okay. Final point. Mr. Melsheimer discussed some technology -- the fact that there were technology

changes and that the value of technology fluctuates over time. And I think that's a fair characterization, isn't it?

A. Yes, sir.

Q. No reason to disagree with that?

A. Correct.

Q. Did something happen in 2010, a year ago from today, that would tell you -- tell you about the value of hierarchical access today, more than 15 years after Mr. Carter invented it?

A. The fact that SAP has -- has left it in, even after an infringement finding, that tells me that it's still valuable to SAP's customers.

Q. Thank you, Mr. Weinstein.

MR. COLE: Pass the witness.

THE COURT: Recross?

MR. MELSHEIMER: Briefly, Your Honor.

RECROSS-EXAMINATION

BY MR. MELSHEIMER:

Q. Mr. Weinstein, you know that Dr. Mercer is going to testify today to the jury that, in fact, the feature has been disabled. You know that, don't you?

A. As far as I know.

Q. And you're not a technical expert who can evaluate that one way or another, correct?

A. Correct. I'm not.

Q. And the fact that something is still in a product -- let's go back to my Word analysis, Microsoft Word. The fact that gothic -- old English gothic is still one of the fonts in there, that doesn't mean that Microsoft has decided that that has tremendous value, does it?

A. I can't speak for Microsoft --

Q. Okay.

A. -- but that's a possibility, yes, sir.

Q. Okay. All right. And this is a software feature or a software program that has literally tens of thousands of features, correct?

A. We're talking about SAP?

Q. SAP. I'm sorry. I'm switching on you to SAP.

A. Yes, sir.

Q. Now, with respect to this Lucent question, I don't want there to be any confusion about it, so let's pull up 824.

No one's disputing that Lucent bought some product from Trilogy, but in addition to that, sir, no one is disputing, are they, that as of April 1998 (sic), the quarter preceding that, before this patent had issued, that they lost a 15-million-dollar deal with Lucent, right? That's what that says.

A. Well, it says that, and then it says it should be able to recover in the fourth quarter.

Q. All right.

A. I'm not sure what all that means, because they do have Lucent as a customer.

Q. But we know that Mr. Liemandt felt like, at least in '98, that they bet big on Pricer and failed to deliver.

A. That's what it says.

Q. Now, let's talk about this -- this concept of -- I'm sorry. I think I just said the patent issued in 1998, and you didn't correct me, but you know that it didn't issue until 2003, right?

A. We know all that. And if that's what you said and I didn't correct you, then I didn't.

Q. All right. All right. I got to watch myself.

Mr. Weinstein, it's important for the jury to appreciate this point about Panduit. When we're talking about this notion that -- you say that Trilogy had decided to focus on selling the Pricer product as a bolt-on to SAP, correct?

A. Yes, sir.

Q. And your point is, well, gee, if SAP is putting it in there for free, no one's going to buy it.

A. Correct.

Q. The facts are a little bit different, though, sir, because isn't it true that Mr. Carter, the inventor -- I believe he's still back in the courtroom -- testified that they were trying to sell -- trying to sell Pricer to all customers, not just SAP customers, right?

A. Sure.

Q. They were trying to sell to Oracle customers, right?

A. Yes, sir.

Q. They were trying to sell to other customers that used other kinds of software, correct?

A. Also true.

Q. So in April of 2003, when they got their patent and SAP had this infringing feature in it, Trilogy could have gone out and sold Pricer to any of those other companies, and they couldn't sell a one, right?

A. That's true.

Q. And Mr. Carter told you they were trying, right?

A. At some time period, they were trying, yes, sir.

Q. And those other companies, those other potential customers were out there for the taking if Trilogy could convince them that it was -- that their

product was a good value, worked well, and it was something good for their business, right?

A. True.

Q. One final question. On these 93 lost customers, just so there's no confusion, you don't know who any of those people are, right?

A. I haven't identified them, that's correct.

Q. So when we're talking about 93 companies or 17 or 20, we don't know who any of those people are, any of those companies.

A. Yeah, but they're -- they're -- they're customers that come from that 1,360 that had access to Trilogy's product --

Q. They're --

A. -- due to SAP's infringement.

Q. They're customers that came from that list, but you haven't identified even -- any of them as an actual named customer for your 93, true?

A. Yes, sir, that's true.

MR. MELSHEIMER: Thank you, Mr. Weinstein.

THE COURT: Anything else?

MR. COLE: Briefly, Your Honor.

Mr. Diaz, could you find PX1950, Page 12?

REDIRECT EXAMINATION

BY MR. COLE:

Q. I want to talk to you briefly about the -- the rest of the market that Mr. Melsheimer said Trilogy could have sold to but didn't.

This is a SAP document. It's a PowerPoint put together by SAP's Chief Financial Officer in 2010, I believe. Can you tell us what this shows?

A. Yes. It shows that 76 percent of the Global/500 companies are SAP customers.

Q. And Global/500 is the biggest of the big companies in the world?

A. Correct.

Q. Now, I mean, obviously, there's 25 percent that aren't, but what does that tell you about the availability of the market for the super large companies that don't have SAP and therefore don't have the Trilogy's invention for free?

A. Well, basically, it says that SAP had three-fourths of the market. So if -- if that part of the market is -- is denied Trilogy because SAP has its infringing technology, Trilogy is at a significant -- very significant disadvantage in terms of its ability to sell.

Q. Okay. And SAP had a very substantial market share of the Fortune 500 and Global 2000 type companies as well, right?

A. Correct.

MR. COLE: Thank you, Mr. Diaz.

Q. (By Mr. Cole) Last question on Lucent. Lucent was one of the top 10 customers in the spreadsheet you looked at to determine profit margins.

A. It was.

Q. I don't expect you to have this memorized, but would it surprise you if they paid Trilogy about $90 million in total during the period of time?

A. I don't have it memorized, but it wouldn't surprise me because it was one of Trilogy's biggest customers.

Q. Okay. Thank you.

THE COURT: Anything else?

MR. MELSHEIMER: Briefly. Briefly, Your Honor. I can take a hint there.

May it please the Court.

RECROSS-EXAMINATION

BY MR. MELSHEIMER:

Q. Mr. Weinstein, that number of a -- 76 percent of a Fortune 500 in 2010, you don't know if that was 76 percent back in 2003 or 2004 or 2005, right?

A. Not specifically, no, sir.

Q. You don't know if it's been steady or grown over the years, right?

A. That's true.

Q. But let's just take that 24 percent. That 24 percent of those companies, 24 percent of 500 is, what, about a little over a hundred?

A. Correct.

Q. A hundred possible prospects, and Trilogy could not make a sale to even one of them; isn't that right?

A. That's true.

Q. Thank you.

MR. MELSHEIMER: Thank you, Mr. Weinstein.

Thank you, Your Honor.

MR. COLE: Nothing further, Your Honor.

THE COURT: All right. Counsel approach.

(Bench conference.)

THE COURT: Do you have any additional witnesses?

MR. COLE: We have a deposition to play. I need to talk to Mr. Baxter about one thing before -- about that.

THE COURT: Okay. Well -- all right.

MR. MELSHEIMER: We will have a motion, obviously, Your Honor.

THE COURT: No. I understand. I just -- all right. Well, I'm going to go ahead and break them for the morning.

MR. COLE: Okay.

THE COURT: I didn't realize you had deposition clips.

MR. COLE: It's about 10 minutes.

MR. MELSHEIMER: Did you want to keep going?

(Bench conference concluded.)

THE COURT: All right. Ladies and Gentlemen, I'm going to excuse you for the morning recess at this time.

Take about 20 minutes. Be back ready to come in the courtroom at about 10:35. Have a nice recess.

LAW CLERK: All rise for the jury.

(Jury out.)

THE COURT: Mr. Weinstein, you may step down.

THE WITNESS: Thank you, sir.

THE COURT: Y'all have a seat.

For purposes of the record, my understanding, that Court's 1 was tendered yesterday; is that correct?

All right. It's received as Court's 1.

Can we get a stipulation that after the deposition excerpts are played, that any motions can be

deferred until the noon hour so I don't have to break the jury again?

MR. BAXTER: Yes, Your Honor.

THE COURT: Mr. Melsheimer?

MR. MELSHEIMER: So stipulated.

THE COURT: Okay. It will be deemed timely made if it's made over the lunch hour.

Court's in recess.

LAW CLERK: All rise.

(Recess.)

LAW CLERK: All rise.

(Jury in.)

THE COURT: Please be seated.

All right. Who will be your next witness?

MS. FITZGERALD: Versata calls Barbara Althoff-Simon by way of her May 8th, 2009 deposition testimony. Ms. Althoff-Simon is a SAP employee who works in SAP's maintenance and support organization.

THE COURT: All right. Thank you. Get the lights.

(Video playing.)

QUESTION: Good morning. Would you please introduce yourself?

ANSWER: All right. My name is Barbara Althoff-Simon. I'm working for SAP AG. My background

is mathematics. I jointed SAP in 1986, and since then working for SAP in various roles.

QUESTION: Is it possible to sell, on a stand-alone basis, only the pricing functionality contained in sales and -- sales and distribution?

ANSWER: I'm not aware of any situation where we -- where a customer can use it this way.

QUESTION: So technically, it is impossible to sell only the pricing functionality in sales and distribution?

ANSWER: I mean, the -- the pricing functionality itself is only part of a process. So a stand-alone, I have no idea how it -- to use it, just the pricing.

QUESTION: So before SAP begins developing a new feature in one of its products, does it check to see if there's any patents in place that might cover that feature?

ANSWER: No.

(Video clip ends.)

THE COURT: Does that conclude the offer?

MS. FITZGERALD: Yes, it does.

THE COURT: Okay. Who will be your next witness?

MS. FITZGERALD: Versata calls Melissa

McNally by way of her July 31st, 2009, deposition. Ms. McNally is an SAP employee and she's employed by SAP as a client partner.

THE COURT: All right.

(Video clip played.)

QUESTION: Good morning, Ms. McNally. Could you please introduce yourself?

ANSWER: My name is Melissa Lynn McNally. I work for SAP America.

QUESTION: Okay. So from -- from your personal experience, at least half of the customers you've worked with have had customer hierarchies in their SAP system?

ANSWER: Yes.

QUESTION: And so again, from your personal experience, how common is it for customers to have product hierarchies set up in their SAP systems?

ANSWER: They -- they do, all of them, pretty much.

QUESTION: Okay. So Colgate did have a form of a customer hierarchy, as you just described, it just wasn't the default SAP customer hierarchy?

ANSWER: That's correct. It -- it was -- that was more complex than they needed, so we kept it a very simple parent-child relationship and built a Z

table to do it.

QUESTION: Okay. Other than Colgate, can you -- can you recall the names of any other SAP customers that you've worked with that didn't have a customer hierarchy?

ANSWER: You know, first of all, from the hands-on consulting, which is what I would be speaking to because that's -- that's what I would know, I don't recall anybody that didn't have a customer hierarchy of some kind. The question is whether they used SAP or not. And quite honestly, I don't remember that from all the customers.

(Videoclip ends.)

MS. FITZGERALD: That concludes the offer.

THE COURT: All right. Who's your next witness?

MS. FITZGERALD: Versata now calls Mr. Wolfgang Nieswand. Mr. Nieswand is employed by SAP and he is a software developer.

(Videoclip played.)

QUESTION: What is the smallest module you're aware of within SAP ERP 2005 that would include the code for product hierarchies, customer hierarchies, and access sequences?

ANSWER: From the technical perspective?

QUESTION: Yes.

ANSWER: ERP.

QUESTION: The whole thing?

ANSWER: Yep.

QUESTION: So if less than 1 percent of the ERP code relates to pricing, what's the smallest unit of pricing code or the module or whatever you want to call it, that will do pricing, product hierarchies, customer hierarchies and access sequences?

ANSWER: No, once again, I think that smallest module you cannot identify. It's spread among the system. So if you run pricing, it does not make sense only to run pricing in the sales, but you also need to bill at some point in time. So where's the border?

QUESTION: So it's your testimony, then, that it's impossible or impractical to identify the smallest unit of code within ERP 2005 that's capable of performing pricing, using product hierarchies, customer hierarchies, and access sequences?

ANSWER: In that general sense, if you want to execute the -- the business process using pricing, I think that's almost impossible, yes.

QUESTION: One thing we discussed a little bit in your last deposition is you were involved in the

development of the SPE, the sales pricing engine, correct?

ANSWER: Correct.

QUESTION: And the SPE eventually became the pricing code or pricing functionality that's in CRM and IPC, correct?

ANSWER: I would phrase it, once again, differently. So SPE became part of the so-called Internet Pricing Configurator, or the IPC, and that -- that's a component was embedded in the CRM solution.

QUESTION: You talked a little bit about how it would be possible to use R/3 2.2 in various ways. Do you recall that testimony earlier today?

ANSWER: Yes.

QUESTION: I believe you've explained that it was possible to use R/3 2.2 to do pricing, correct?

ANSWER: Yes.

QUESTION: There -- there was product hierarchy functionality in R/3 2.2; isn't that right?

ANSWER: Functionality for the creation or for the maintenance of product hierarchies was existing at that point in time.

QUESTION: And what about with respect to customer hierarchies?

ANSWER: Same thing.

QUESTION: The same statement as --
ANSWER: Same statement as for product hierarchies. So the functionality was existing at that point in time and is still existing.
QUESTION: With respect to the products that are accused in this case, the current products --
ANSWER: Okay.
QUESTION: -- is it possible to use those products without utilizing the pricing functionality?
ANSWER: Yes.
QUESTION: Is it possible to use those products without creating product hierarchies?
ANSWER: Yes.
QUESTION: Is it possible to use those products without creating customer hierarchies?
ANSWER: Yes.
QUESTION: Is it possible to use those products without using hierarchical access sequences?
ANSWER: Yes.
(Videoclip ends.)
MS. FITZGERALD: That concludes the offer for Mr. Nieswand.
THE COURT: Okay. Who is your next witness?
MS. FITZGERALD: Versata calls Dr. Andrei

Hagiu, as its next witness, also by deposition. Dr. Hagiu was retained by SAP to act as an expert witness for SAP in this case.

(Videoclip played.)

QUESTION: Good morning. Please state your name.

ANSWER: Andrei Hagiu.

QUESTION: And what do you do for a living, Dr. Hagiu?

ANSWER: I teach at Harvard Business School.

QUESTION: Okay. What do you teach?

ANSWER: Business strategy.

QUESTION: And you have been hired by SAP as an expert witness in this lawsuit, right?

ANSWER: Correct.

QUESTION: Okay. What was your assignment?

ANSWER: My assignment was to prepare an expert report pertaining to the -- the nature of competition and -- of the -- in the enterprise software industry as relates to the case at hand.

QUESTION: Is it easy or hard for large companies to implement an ERP system like SAP's?

ANSWER: Can you define what you mean by

easy?

QUESTION: Sure. Fast and cheap?

ANSWER: Then the answer is no.

QUESTION: You know for a fact, don't you, that a large company that wants to implement a SAP ERP system will typically spend months, if not years, and millions, if not hundreds of millions of dollars, doing that?

ANSWER: Yes, I do.

QUESTION: Is SAP CRM software module a single functioning unit or is it a compilation of discrete pieces of functionality that could be sold separately if SAP chose to do that?

ANSWER: I think it is neither. Precisely because SAP is selling a software platform, some CRM functionalities are essential to the customers and to third-party application developers. The value -- the value of SAP's products, and in particular of its platform, resides in integration across these different platform modules and different products that others -- that the customers and third-party developers can use. I don't think you can -- I don't think one can characterize CRM as a stand-alone product. It has a more complex relationship with the other products and the SAP -- and with the SAP platform. Because some of

those modules cut across different products.

QUESTION: So is it your opinion that CRM is a single-functioning unit that -- that may interact with other aspects, but a single-functioning unit in itself or is it your view that CRM is comprised of a bunch of specific pieces of functionality that if SAP chose to do it, that they could sell individually to customers?

ANSWER: Again, I think the choice is too binary. I don't think it would be feasible. It would be neither technologically nor from a business standpoint, I don't see how SAP could sell different fractions of the CRM module.

QUESTION: You'll agree with me, won't you, that ERP enterprise software is characterized by very high switching costs?

ANSWER: Correct.

QUESTION: And you'll agree with me, won't you, that it's not unusual for a large company to spend over a hundred million dollars implementing an ERP system, right?

ANSWER: Correct.

QUESTION: It can take months or even years to do that, right?

ANSWER: Correct.

QUESTION: And if you're a manufacturing company like Procter & Gamble, it is an incentive for you to buy SAP's enterprise software if more of your suppliers and customers also use SAP, right?

ANSWER: To some extent, yes, that's true.

QUESTION: It makes doing business easier if the buyers and the sellers and the distributors are on the same general software platform?

ANSWER: Yes.

QUESTION: And from SAP's standpoint, it has an incentive to get more people on its platform so that it can increase the direct network effects of its software, right?

ANSWER: Sure.

QUESTION: Paragraph 81 at the very -- at the bottom of Page 33, you write that: Versata's pricing technology would have been an ideal product to create a partnership and obtain better SAP integration.

Do you stand behind that statement?

ANSWER: Yes.

(End of video clip.)

MS. FITZGERALD: That concludes the offer.

THE COURT: Okay. All right. Who will be your next witness?

MS. FITZGERALD: Versata rests. No

further witnesses.

THE COURT: Okay. All right. Ladies and gentlemen, you've heard all of the evidence in the Plaintiffs' case-in-chief and we're going to now start hearing evidence in the Defendants' case-in-chief.

So Mr. Melsheimer, call your first witness.

MR. MELSHEIMER: May it please the Court, Your Honor, and pursuant to the -- to the previous stipulation, we call Dr. Stephen Becker as an expert witness.

THE COURT: Okay. Dr. Becker come around, please.

(Witness sworn.)

MR. MELSHEIMER: May it please the Court.

THE COURT: Mr. Melsheimer.

STEPHEN BECKER, DEFENDANTS' WITNESS, SWORN

DIRECT EXAMINATION

BY MR. MELSHEIMER:

Q. Dr. Becker, please state your name for the Jury.

A. My name is Stephen Becker.

Q. Dr. Becker, what were you asked to look at in this lawsuit?

A. I was asked to review the opinions of Versata's

experts, conduct my own analysis, and reach conclusions about whether those expert opinions that they've offered as they relate to damages are reasonable.

Q. We'll get into more detail later, but is it fair to say that you were looking at the Trilogy or Versata experts to see if their analysis from a -- the standpoint of your expertise, which we'll get to in a minute, was reasonable?

A. Yes.

Q. So let me give you a chance to talk about yourself a little bit, Dr. Becker. What do you do for a living?

A. I am a professional economist. I own a consulting firm in Austin called Applied Economics.

Q. Tell the Jury about your educational background.

A. Well, I started out first with an undergraduate degree in computer science and engineering, thought I was going to be a software engineer and got a degree in -- in that and did it for a while. And then I went back to school in Austin and got a Master's degree, an MBA in Finance, from U.T. Austin. And since I grew up in Austin, born and raised there, I kind of wanted to stick around, so I came back for graduate school again and got a Ph.D. in Public Policy from U.T. Austin.

Q. What was the focus of your studies for your Ph.D. in public policy?

A. I studied particularly a field called econometrics.

Q. What is econometrics?

A. Econometrics is the practice or the -- the field of taking the -- kind of the -- essentially the tool kit that economists have, sort of the hammers and saws and screwdrivers that economists use and applying those to real world problems to answer important questions about what's going on in the -- in the economy or in the world.

Q. When did you get your Ph.D. from the University of Texas?

A. 1998.

Q. Did you write a thesis for that Ph.D.?

A. I did.

Q. What was your thesis about?

A. My thesis looked at the question, one of these real world problems I looked at was whether spending more money and providing more resources on public education, particularly elementary and secondary education, whether that would provide better outcomes, better student outcomes.

Q. What did you find out?

A. I found out that if intelligently spent, that those resources would provide better outcomes.

Q. In doing your thesis for your Ph.D., did you come across some statistical information that you found to be misleading or not giving the -- the correct impression?

A. Yes, I did.

Q. Tell the Jury about that.

A. Well, really the -- the motivation to do this study was the fact that economists and policymakers for several decades have been looking at data, looking at this question, and many, many of them were coming to the conclusion that spending -- or essentially that money doesn't matter when it comes to getting better student outcomes.

Q. And what did you conclude?

A. Well, I concluded two things. One, that it does matter; and more importantly I concluded through my research, that it was the statistics that were causing them -- the misleading statistics that were causing them to reach that conclusion, not what was really going on in the classroom.

Q. How were the statistics misleading that you studied?

A. Well, it turned out that most researchers were

using data that was far too broad and too generalized to answer this question about whether if you give a teacher more resources, can that teacher provide a better outcome for the students in his or her classroom.

Q. Did you write up your results?

A. Yes.

Q. Was it published?

A. Yes, it was -- I published my dissertation --

Q. Now, did --

A. -- like all dissertations.

Q. -- did the results of that -- of that dissertation square with your -- your common sense and experience?

A. They did. The --

Q. How so?

A. I grew up in a house full of teachers; both my mother and father were school teachers, and both of my sisters are involved in education. So in our house, I think everybody understood that if you give a teacher more resources, they can get a better result. So that's what really had motivated me to go do this study.

Q. What did you do after you got your Ph.D. from the University of Texas in 1998?

A. I formed Applied Economics, the firm that I currently have.

Q. Have you ever testified before as an expert in a lawsuit?

A. Yes.

Q. How many times?

A. I've been retained as an expert in over a hundred lawsuits.

Q. Have you ever testified in connection with a patent case?

A. Yes.

Q. How many?

A. More than two dozen.

Q. Have you ever testified here in Marshall, Texas?

A. Yes. This is, I believe, my fifth time in this courtroom.

Q. All right. How about elsewhere in the Eastern District?

A. I've testified in Tyler and in Texarkana a number of times.

Q. Have you been accepted as an expert by the Court in all those cases?

A. Yes.

Q. And what has been just the general subject matter of the expert testimony you've provided, just in a general way?

A. Well, in, as you indicated in a prior question, over two dozen of those cases were patent infringement cases, and my subject matter in all of those was the damages part of the case, either reasonable royalty or lost profits.

Q. Have you ever worked as an expert, an economic expert, in a case involving software?

A. Yes.

Q. How many?

A. Oh, at least a half a dozen.

Q. Do you have any particular professional or educational expertise in software?

A. Yes.

Q. What's that experience?

A. Well, I -- as I indicated earlier, I have an undergraduate degree in computer science and engineering. I conducted my research in school on software engineering and first job out of school was as a software engineer for Schlumberger, the oil field services company.

After that -- after I left Schlumberger, I formed a small software company of my own and spent many years writing software.

Q. Now, when you were in school or in your professional life, have you received any honors or

awards?

A. Yes.

Q. This -- this is no time to be modest, so go ahead.

A. Well, when I was an undergraduate, I was at the University of Pennsylvania, something known as a Benjamin Franklin Scholar. There are a handful of students that are invited to be Benjamin Franklin Scholars each year and I was a Ben Franklin Scholar for all four years that I was there.

The last two years at the University of Pennsylvania, I received the award for the top engineering student in my junior year and top engineering student in my senior year that the faculty votes on within each department.

Q. Are you -- are you a member of any professional organizations or societies?

A. Yes. I'm a member of the American Economic Association, the American Finance Association, and the Licensing Executive Society.

Q. What do you like to do for fun?

A. Well, when I'm not working or driving my teenage kids around, I like to fish and spent about 10, 12 years singing in a gospel choir.

Q. Now, Mr. -- or Dr. Becker, you're a married

man?

A. Yes.

Q. Been married for 17 years?

A. Yes.

Q. Got two teenage daughters or sons?

A. Daughter and a son.

Q. Daughter and a son, all right.

Now Dr. Becker, I want to go back to what you were asked to do in this case and I believe you told us that your work involved determining whether the Trilogy experts were being reasonable in their analysis and their conclusions, right?

A. Yes.

Q. Now, I take it to come to -- to -- to be able to evaluate that, you had to do some work?

A. Yes.

Q. What did you have to do and what did you go about doing?

A. Well, the first thing I did was to read the Versata expert reports that each of their experts filed and read their depositions. In the case of Mr. Weinstein, I attended his deposition and that gave me an understanding of what they had done and what their opinions were.

I also read hundreds, if not thousands, of

documents in this case and analyzed a substantial amount of data and also conducted some independent research of my own.

Q. Why did you do all that?

A. Well, I wanted to see whether the facts and assumptions that Trilogy's experts were using as the basis for the damage claim that they're making here were reasonable.

Q. Did you charge for your time, sir?

A. Yes.

Q. Now, can you tell the Jury how many hours you spent doing all the things you did to get ready for your testimony here today?

A. I honestly stopped counting at about 200 hours. I've personally spent over 200 hours on the case.

Q. All right. Now, looking at what you looked at, looking at the Versata expert reports, looking at the documents that have been produced by the parties, the testimony that's been taken in the case, and some independent work that you did on your own, did that put you in a position to determine whether the Versata position in the case as advocated by their experts was reasonable?

A. Yes, I think it did.

Q. What did you conclude?

A. I conclude that the lost profits claim that they're making here that I heard Mr. Weinstein explain just before me is not reasonable.

Q. Why do you -- are there -- is it -- is it -- is it unreasonable in two different ways?

A. Yes, it is.

Q. What's the first way it's unreasonable?

A. Well, it's unreasonable because it is not consistent with the facts in the case as I sort of see them on the -- in the record that I reviewed.

Q. And is it unreasonable in the sense of whether they're entitled to lost profits?

A. Yes. It -- as -- as we heard the discussion earlier, lost profits is a particular form of recovery in a patent case, and you essentially have to be eligible for it. The Plaintiff has, as I understand the law, has to prove certain things, and based on my analysis, I concluded that they -- those conditions for receiving lost profits have not been met.

Q. Dr. Becker, did you help us prepare some slides over the evening to help guide us through your -- your testimony?

A. Yes, I did.

Q. All right. Let's take a look at Slide 2. Now, this was your assignment to review and examine the

expert opinions of Versata, review the evidence and determine if they were reasonable, correct?

A. Yes.

Q. Did you do all that?

A. I did do all that.

Q. All right. Now, we're going to skip to your conclusion, which is Slide 8. And after you reviewed their expert opinions, reviewed the evidence and conducted analysis, you concluded that Versata lost profits opinions are unreasonable; is that right?

A. That's correct.

Q. So let's talk about that in a little more detail. I want to make sure that we're both on the same page. Are they unreasonable in the sense of they -- they're not entitled to lost profits, in your view based on the evidence?

A. That's one primary reason.

Q. And is the calculation of how they did it, how Mr. Weinstein did it, do you take any issues with that?

A. Yes, I do.

Q. Okay. So we'll talk about that a little bit later. But let's first talk about these Panduit factors that we heard something about from Mr. Weinstein.

Dr. Becker, Slide 9, is this the Panduit factors that you understood Mr. Weinstein considered and

that, in fact, you considered?

A. Yes.

Q. All right. So what are these factors?

A. Well, first one, demand for the patented product, you've got to prove that.

They need to prove that there were no acceptable alternatives to the patented feature.

Third, that they had the manufacturing and marketing capability to exploit the demand. That means they would -- would have been able to sell the product.

And fourth, you have to be able to reasonably determine how much profit they would have made if you meet the first three conditions.

Q. We're going to go through these, Dr. Becker, but just at a fundamental level, what -- what fundamental question are these factors trying to answer?

A. Well, this set of four factors, if you sort of boil them down, really what it's asking is if in 2003 SAP's product, its ERP system, had not had this feature, would Trilogy have reasonably made sales of Pricer to anybody.

Q. All right. Now, let's take a look at these first two Panduit factors; demand for the patented product and no acceptable -- acceptable substitutes. Does it make sense to sort of consider those together?

A. I think it does.
Q. Tell the Jury why you say that.
A. Well, demand for a product depends in significant part on the price of the product. And so what a consumer would consider as an alternative, say no, I don't think I'll buy that, I'll buy something else, is wrapped up with the price of the product as well.
So you can't really evaluate whether there's demand for something unless you are also thinking about what they would switch to if you gave them -- sort of made an offer to them of buying a particular product.
Q. Did you and I talk about an example that might, you know, illustrate this circumstance --
A. Yes.
Q. -- that maybe some of the Jurors might be familiar with?
A. Yeah. Yeah, I think a -- a good example in terms of this concept of demand depends on more than just, you know, somebody being willing to buy it.
Flat screen TVs today, you could go get a flat screen TV at Walmart for $300. If that same TV was offered today, exact same, say a 36-inch TV for $3,000, I think most consumers would find plenty of

alternatives, right there on the rack or maybe at another store, but the demand for the $3,000 flat screen TV is going to depend on its price and the alternatives.

Q. Now, in other words are you saying that today you might have demand for a flat screen TV at $300, but maybe not at three or five or $10,000, correct?

A. Correct.

Q. Was there a time, just to take this example, where there was demand for a flat screen TV at five or $10,000?

A. Sure.

Q. Tell us about that.

A. Well, when flat screen TVs first came out, you know, they were something new and different and the early adopters, the people who really, really wanted to have a flat screen TV and had special needs for it or just, you know, were one of those people, like I've got some friends like that who really want to have the latest gadget, there were people who would buy a $3,000 flat screen TV. But over time the market has evolved such that I don't think you would find any, in a given size range, at that price that they were five or 10 years ago.

Q. Well, if somebody that was selling an early flat screen TV for three or $5,000 showed up today and

with the same kind of features and functions and said I want to sell my flat screen TV for three or $5,000, what would happen?

A. They wouldn't sell any.

Q. Would it be -- but what if the guy came back to you and said, well, wait a minute. I sold a lot of these televisions when they first came out for three or four or $5,000 that must mean I can sell them for three or four or $5,000 today?

A. Well, I think they find in the marketplace the market would say no, that's -- you can't do that. What you sold it for three to five years ago, particularly if the market has moved -- has evolved, what you sold it for before was not relevant. You have to look at the point in time that you're assessing the question about demand and alternatives.

Q. Do markets change over time?

A. Absolutely.

Q. Does technology change?

A. Yes.

Q. Does that affect a demand for a product patented or not?

A. Yes.

Q. Now, did you study the question of whether in 2003 to 2010, and that's the -- that's the so-called

damages period in the case; is that right, sir?

A. Yes.

Q. Did you study whether there was demand for the patented feature here such that there were no acceptable alternatives?

A. Yes.

Q. All right. Now, can you summarize for the Jury, and let's take a look at your -- at your next slide, please, sir. Let's actually go to -- all right. Well, let's actually go to 10 for just a second. Slide 10.

Okay. This is actually a summary of your opinions that we're going to get to in a minute, but -- so you're saying they're not eligible and even if they were be eligible they're overstated and that's some of the detail we're going to get into --

A. Yes.

Q. -- does that make sense? All right. So let's go to Slide 11. And what does this say?

A. Well, these -- this summarizes some of the key thing that I -- excuse me -- find important to this question about whether in 2003 to 2010 anybody would have bought the Trilogy product if it was offered, particularly if it was offered at the prices from back in 1998.

Q. Do you need some water, Dr. Becker?

A. I've got some.

Q. Okay. So the first bullet point there, no evidence that anyone purchased from SAP because of the patented feature. Why is that important?

A. Well, that's one of the -- you know, as an economist we look at -- at -- go around looking for evidence of people having demand for things. And if this feature were important, I would expect out of the thousands of customers -- excuse me -- that SAP has, that this might have been the basis for at least somebody saying that's why I'm going to buy SAP. And there's no evidence that I've found anywhere in the case that anybody ever purchased SAP because of the feature.

Q. Did Mr. Weinstein find any such evidence?

A. No.

Q. So let's take a look at your -- let me ask you this: Did you find any Trilogy documents suggesting that people purchased SAP because of this particular feature?

A. No.

Q. Did you find any SAP documents proving that customers bought SAP because of this particular feature?

A. No.

Q. Now, let's look at your next bullet point. 65

percent plus of SAP customers never used any element of the patented feature, despite having access to it at no additional cost.

What is that referring to?

A. That's referring to this so-called survey that Mr. Bakewell talked about.

Q. All right. Well, let's talk about that. So I thought -- I thought that survey, I thought they were trying to use that to show that -- that people did use it. You're saying that it -- you're saying it suggests that 65 percent didn't use it?

A. Yes, that's -- the survey results would show that at -- at a bare minimum 65 percent are not using it despite having it sort of sitting there in front of them.

Q. And why do you say that? Why do you say that 65 percent just from that survey do not use the specific pricing functionality?

A. Well, there was a bunch of discussion earlier and yesterday about what a yes on that survey meant, but the one thing I think -- I don't think there's any disagreement about is that when a company said no, we're not using hierarchical access or any of the customer or product hierarchies, that meant that that company was not using the feature in any way. And 65 percent of the

customers out of the group that responded said no.

Q. That was 26 out of 40?

A. Yes.

Q. All right. So what about the 14 customers who answered yes? Were you here the other day for the testimony of Mr. Bakewell?

A. Yes.

Q. Have you reviewed the deposition questions, the so-called survey?

A. Yes.

Q. Can you conclude that -- from the answers and the questions, that customers who answered yes were, in fact, using the specific pricing functionality that's at issue?

A. No, I can't.

Q. Why not?

A. Well, because of the way the question was asked. They never asked the actual question that would get an answer that would tell us definitively whether anybody was, in fact, doing -- using the capability that was found to infringe, namely, all of those steps combined.

Q. Okay. And you remember we went through this --

A. Yes.

Q. -- with Mr. Bakewell?

And you've got to have all three of these components?

A. Yes.

Q. So if you're just using a product hierarchy in some way, you understand that's not infringing the patent.

A. Correct.

Q. If you're using a customer hierarchy in some way, you're not infringing.

A. That's correct.

Q. If you're using hierarchies, you're not infringing.

A. That's correct.

Q. You have to do all three together to get a price.

A. Correct.

Q. What would have been the right way to ask the question in your opinion?

A. Well, it would have been simple to ask the obvious question: Are you doing these three things together to generate a price?

Q. Did you hear Mr. Bakewell explain why that question wasn't asked?

A. I heard him answer the question, but I didn't hear an explanation for why the question wasn't asked.

Q. So let me just kind of run through this survey with you, the deposition. We're calling it a survey. Is it actually -- is it actually a survey? It's a series of depositions, right?

A. It was a series of depositions.

Q. Okay.

A. I wouldn't call it a survey.

Q. All right. So -- but from that data that the jury's heard, just taking it at face value, it indicates --

A. Here's a better one.

Q. You have a better one? Okay. Thank you.

Start out by concluding that 65 percent, there's no use.

A. Yes.

Q. And that's just because you look at the noes, and if you assume no is no, we don't use it as the appropriate questions, it's no use, right?

A. That's correct.

Q. Now, that leaves, by my count, 35 percent left. What can you say about those people, based on this -- based on the questions?

A. I'm not --

Q. Can you say anything?

A. No. We -- we certainly can't say that they

are, in fact, using the infringing capability.

Q. All right. I want to talk a little bit about -- so to get back to your point here, 65 percent -- and you say plus, because we know it's at least 65 percent, and with respect to this 35 percent, it's a don't know based on the answers to the questions.

A. That's correct.

Q. Okay. So 65 percent plus, maybe -- maybe a whole lot more than that, have never used the feature. What does that -- in the way that it's infringing use. What does that tell you about the demand for the patented invention?

A. Well, as an economist, it tells me a tremendous amount about it.

Q. Tell the jury what that is.

A. If -- if someone has available to them a feature that did not -- they didn't have to pay any extra money for it, so it's just sitting there in front of them, available every day they turn on their system to use it, and for three, four, five, six, as many as, I think -- you know, back to 2003, it could have been more than seven years of that being there -- if they never used it, that tells me that the demand for that -- you certainly wouldn't conclude that any one of those people would run out and pay money for it if they had never

used it when it was provided to them at no additional cost.

Q. And we had this -- I had this conversation with Mr. Bakewell. I want to make sure that you and I are communicating to the jury.

The use is not what's the infringing part of it, correct?

A. Absolutely.

Q. It's the capability to do it that's the infringement, right?

A. Right.

Q. Why is use important, though, in valuing the feature?

A. Well, in term -- determining the value to the customer, and in particular in this lost profits question, remember the fundamental question.

We're sort of imagining a world where SAP's system doesn't have the feature in it, and sometime during that 2003 to 2010 period, the Trilogy sales person comes knocking on the door and says: I have this system, Pricer, for $1.8 million. Would you like to buy it?

If we know, we have the benefit of hindsight in knowing that for those seven, eight-year period, people had it at no additional cost and never

used it, to conclude that they would answer yes to the proposal to pay $1.8 million for it is just economically irrational.

Q. Is that the same thing as saying it doesn't make any sense?

A. It makes no sense.

Q. Okay. What about this third bullet point, sir? When you say, by 2003, numerous players in the pricing configuration market, what does that mean?

A. Well, that's going to competition and alternatives. If in this world, this 2003 to 2010 or 2003 to present, we imagine that SAP doesn't have the feature, and we set aside all the people that kind of have already told us by their behavior that they have no interest in the feature, the question is, would they have somewhere else to go, some alternative, if they really wanted complex pricing capabilities that were not provided by their -- not the sort of base part of the pricing at SAP.

Q. Well, let's talk about the marketing in a minute. But let's talk about the technology changes between 1998 and 2003.

Are you with me?

A. Yes.

Q. Okay. So what changed technology-wise that

you're aware of in that -- in that time period?

A. The biggest change is that computers -- big computers, corporate computers, and in particular, laptops and communication speeds all got tremendously faster, tremendously more capable.

Q. Do we have a chart that illustrates that point, sir?

A. Yes.

Q. Explain to the jury what the blue line is and what the gold line is.

A. The blue line is -- this is something that I prepared, went out and found out what an IBM ThinkPad -- it's now a Lenovo laptop -- would have had in terms of hard drive capacity and processing speed back in 1998. And we looked at models all the way up through 2005.

The blue line is showing the increase in the capacity of the hard drive, and the gold line is showing the increase in the speed of the processor.

Q. Okay. What -- what impact does this technological change, the incredible increase in computer size -- what -- what -- and speed, what does that have to do with the ability of Trilogy to make sales of its Pricer product?

A. It -- it makes this value proposition that they had, really that they came up with in 1995, '96, in that

market of providing speed, flexibility, and disconnectedness with this Pricer product, this trend in the market makes those features or those -- those value propositions less attractive, less important.

Q. Why do you say that?

A. Well, I think Mr. Carter used the analogy of having to go to the grocery store. Back in '95, '96, '97, the computers were slow enough, and you didn't have much storage space on your laptop, so you'd have to go to the store and get one thing at the grocery store and bring it home and go to the store again and bring it home, and his invention provided a way to sort of bring more groceries home at once.

Today, or certainly even by 2003, you could put the whole grocery store on the laptop. So the importance of saving those trips to the store is vastly diminished, if not gone all together.

Q. Now, what about -- we've heard some testimony about the internet, the growth of the internet between '98 and 2003 and really up to the present. Does the -- does the development of the internet have any impact on what's going on in the marketplace?

A. Absolutely.

Q. Tell the jury why that is.

A. Well, back, again, to the -- to what -- how

much would this sales pitch resonate with customers in the 2003 to 2010 time period?

And we've heard that one of the things they were sort of selling is the ability to put your pricing system on a laptop, because you were disconnected, couldn't communicate with the home office out at a sales site.

With the internet, we're pretty much connected all the time. And certainly today with -- laptops can stay connected to other computers through the internet. So the value of being able to function in a disconnected way is greatly diminished.

Q. Let's talk about competition in the marketplace. What was happening in the competition of the marketplace in 2002 and then looking at after Trilogy's patent was issued in 2003?

First, what are we -- what are we displaying for the jury here, an excerpt from Exhibit 1596. Tell us what's going on here.

A. This is a graph from this Gartner research. Gartner tracks this -- this market, the sales and pricing configuration market. They put out a report every year.

This is 2002 where we see Trilogy, along with a large number of other companies, providing price

configuration systems, as well as other things that go with that, like sales configuration.

MR. MELSHEIMER: May I approach the witness, Your Honor, and hand him a laser pointer?

THE COURT: Yes.

Q. (By Mr. Melsheimer) Dr. Becker, is Trilogy on this chart?

A. Yes. Trilogy is right there (indicates).

Q. Who else is on the chart?

A. Well, we've got SAP, Siebel, Oracle, a company called Firepond, J.D. Edwards, Click Commerce, iBaan, a lot of different companies.

Q. Does -- does -- is the Gartner Group a reputable group for market analysis and valuation?

A. Yes.

Q. Do they put companies in these boxes that have no business being in there?

A. No.

Q. Okay. So they put competitors.

A. Yes.

Q. And so this is -- and just so we're clear, we know it's for sales configuration, which includes product and pricing configuration --

A. Yeah.

Q. -- or sometimes it's pricing configuration

only, right?
A. Yes.
Q. And Pricer is a pricing product, correct?
A. Yes.
Q. Now, what had happened just a year later -- so I want you -- I want the jury's attention to be focused on Trilogy there. What had happened just a year later to the marketplace?
A. If we look at this same report in February of 2003, we have many of the same companies. Trilogy is not on there anymore. And in the actual Gartner report, it says that Trilogy had changed its strategy and had basically exited this market space.
Q. Now, we -- we -- we heard some testimony about the problems Trilogy was having selling Pricer, and we heard some testimony that they had, in fact, abandoned the market for Pricer.
Do you recall that?
A. I was here for that.
Q. Who said that?
A. Mr. Carter.
Q. Now, the patent was issued in April of 2003; is that right?
A. Yes.
Q. Now, this report is done as of what date?

A. February 2003.

Q. So as of February 2003, where is Trilogy in the marketplace for pricing and configuration software?

A. They've -- they're not in the market.

Q. Let's just be clear. Here they are in 2002 right in the middle there, and by 2003, Gartner doesn't even list them.

A. That's correct.

Q. Before this patent's ever issued, right?

A. Yes.

Q. Now, are the companies that are in this competition, the companies that are in the marketplace for pricing -- there has been some testimony that, well, these companies were no good; they weren't really able to do the -- the pricing that companies need.

You heard that from some of the Trilogy witnesses, didn't you?

A. Yes.

Q. All right. Did you look behind some of this data to determine if, in fact, the competitors on here were providing complex pricing?

A. Yes.

Q. Do you have a slide that illustrates what you found?

A. Yes.

Q. Let's take a look at that. What -- what is shown on our first slide?

A. Well, the first one here is -- basically what I did is, I went and looked for customer quotes or anything that would tell me what particular customers these folks were selling to and whether there was any evidence that they were doing complex pricing with these -- with the offerings of these companies.

We see here i2, DCM. This says that it allows Toshiba to easily author and publish parts and material descriptions online, manage pricing details to ensure they only see appropriate pricing levels and keep catalog content updated in realtime.

If you go to the next one, this --

Q. This is this -- I wanted to ask you about this one, because this is the funniest name, Blue Martini.

A. Yeah. I don't know who came up with that name, but they --

Q. All right. Blue Martini, what are they doing?

A. Well, we can see that they're providing the ability to handle complex pricing. The customer quote there was: In addition to providing better service across all business units, we wanted something that would manage and streamline our vast product catalog, complex pricing structures, and tens of thousands of

promotions.

So the very same sorts of complex things that Fortune 500 companies are having to deal with, Blue Martini is providing that to this particular customer.

Q. What about Comergent Technologies?

A. Comergent, we see that they're also doing -- providing access to product information, realtime pricing and availability for Maytag through the e-commerce side of Maytag.

MR. MELSHEIMER: And just for the record, this is all from DX3010.

Q. (By Mr. Melsheimer) What about iBaan?

A. Well, iBaan and their customer relationship management system is providing Hitachi advanced functionality, including more tightly integrated configuration, quote building, accurate, fast, and repeatable proposal generations, integrated pricing that supports specific pricing rules, and hierarchical discount approvals and forecasting updates -- upsides to help shorten preparation time for executive level meetings.

MR. MELSHEIMER: I want to focus on this. Can you highlight this phrase (indicates)?

You know what? I don't think you can because this is in PowerPoint, isn't it? I apologize,

Mr. Barnes.

Q. (BY MR. MELSHEIMER) So let's look at this for a second. It supports specific pricing rules, territory, customer, special promotions. So there's a customer hierarchy, right?

A. Yes.

Q. Pricing rules, territory.

A. Yes.

Q. I believe we heard some example about a customer buying a truck in Texas.

A. Yes.

Q. So you had a territory of Texas, a customer buying a truck.

Special promotions, you might be having a sales on something --

A. Yes.

Q. -- right?

Volume, that just means, you know, if you buy a hundred, it might be cheaper than buying ten --

A. Yes.

Q. -- right?

Okay. So these are -- are these precisely the kind of pricing issues that Mr. Carter described as something Pricer -- was a need in the market Pricer was meant to satisfy?

A. Yes.

Q. And by --

MR. MELSHEIMER: Can we go back one -- can we go back to the original slide?

Q. (By Mr. Melsheimer) And by --

MR. MELSHEIMER: One more. Now you're going forward on me. It's back to the original slide. Right. Exactly.

Q. (By Mr. Melsheimer) The original slide, by February 2003, two months before this patent issues, they're not even listed by the folks at Gartner as being a player in this market.

A. That's correct.

Q. Have you heard any suggestion from any witness, Trilogy or otherwise, that Gartner is either unreliable or doesn't do their homework with respect to this analysis?

A. No.

Q. Now, in addition to other companies that could provide pricing software, were you in the courtroom when Mr. Dholakia talked about Trilogy having to compete against the option that any customer had of simply customizing their SAP installation?

A. Yes.

Q. All right. What did he say about that?

A. He said that SAP customers -- one of the options that they have, that even back in '98, Trilogy understood that it was competing against, was the customer simply going out and hiring -- either doing it themselves or hiring consultants to provide a customized solution on top of their SAP system.

There's a whole sort of business out there in the economy of people that do nothing but provide customizations to SAP systems.

So that's an option available to all of SAP's customers that I heard Mr. Dholakia say they understood back in '98 was something they were having to compete against.

Q. What's the significance of the fact that back in '98 and '99 and 2000, up to -- up to February 2002, what's the significance of all this competition out there in the pricing software network?

A. Well, one, it is something that we have to consider in the lost profits question about whether it's reasonable to conclude that if Trilogy shows up in April of 2003 with a 1.8-million-dollar product, anybody is -- given the market conditions at that time, is anybody going to say: Yeah, I think I'll buy that?

Q. So one of the things that Trilogy would have to do in April of 2003 -- and, again, this is -- this

but-for imaginary analysis that Mr. Weinstein did, right?

A. Yes.

Q. They'd have to call the people at Gartner and say: You know what? We're going to get back into this box.

A. Right.

Q. And they'd be in that box with about a dozen or more other companies, right?

A. Yes.

Q. And they'd be in that box with SAP customers who simply chose to customize their solution to do pricing in a different way.

A. Yes.

Q. Now, I want to talk about -- we talked about Gartner. I want to talk about Trilogy.

Is there any evidence that you've seen in the case and in your review and analysis that Trilogy -- again, before they came to court, that Trilogy understood the market conditions and the economic facts they were facing?

A. Yes.

Q. All right. Let's review some of those documents.

First, let's look at Defendants'

Exhibit 811.

MR. MELSHEIMER: May I have one moment, Your Honor?

THE COURT: Yes.

(Pause.)

MR. MELSHEIMER: May I -- may I approach the witness, Your Honor?

THE COURT: Yes.

Q. (By Mr. Melsheimer) What is it about Exhibit DX811, sir, that informs your analysis that Trilogy knew exactly what was happening in the marketplace between 1998 and 2003?

A. Well, this is in September of 1998. If we look on the third page of this document where you've got it highlighted there, this tells me that they understood that the value proposition, which is just kind of business jargon for how good was the pitch they were making, how likely was it to be accepted, that the value proposition they had was one that had worked, but they understood that it had a very limited appeal.

Q. All right.

MR. MELSHEIMER: Let's go to the next page, the Jeff Wolf e-mail.

Q. (By Mr. Melsheimer) This is an e-mail from Mr. Wolf at Trilogy to Mr. Dholakia. We heard him

testify.

A. Right. And this one, I -- I think, is pretty significant, because I heard Mr. Weinstein explain that his lost profits model is premised on them entering the market in 2003 as a bolt-on, not positioned as a full suite of capability, that they were going to just bolt on to SAP.

And Mr. Wolf here is giving, back in '98, his impression of what the bolt-on value proposition. It says -- My under --

THE WITNESS: If you highlight there.

A. My understanding was that we were trying to sell a bolt-on Pricer solution to existing SAP customers.

That's exactly what -- the question we had before us in 2003 is. What's the attractiveness of bolt-on --

It says: Although there was a lot of interest in this, we learned the hard way that only a few of these companies were willing to pay more than 50,000 for this type of functionality.

Q. (By Mr. Melsheimer) And then he talks about they may be able to close a larger number of deals of $500,000. Would that be with other types of Trilogy software besides Pricer?

A. Well, I think they were clearly trying to avoid having to go all the way down to that 50,000-dollar price point.

Q. At this time, they were a million eight?

A. Yes.

Q. Okay. And they were having difficulties.

A. Yes.

Q. All right. Now, let's take a look at one more piece of this e-mail.

MR. MELSHEIMER: Well, actually, let's go to another one. Let's go to Exhibit 810, Mr. Barnes.

Q. (By Mr. Melsheimer) Now, this is also an e-mail from Mr. Dholakia -- Dholakia (pronouncing) to Mr. Liemandt.

Now, you don't see this on a lot of evidence, but it says: This mail is time critical. Please read and send back comments.

So this was a time-sensitive document, right?

A. Yes.

Q. All right. And is there anything in here that tells you back in -- even a year earlier, back in 1997, what was happening in the marketplace and what Trilogy knew about it?

A. Yeah. The second -- well, the second full

paragraph after that time critical, it starts: The common thread --

THE WITNESS: If you can highlight that. Right there, that whole -- whole paragraph.

A. So this is the common -- sort of the common thread in the market. The common thread amongst these companies is, one, that they can do all their pricing in SAP. And this is a statement about the market before SAP added the hierarchical access functionality.

They do want easier maintenance of the data, but they don't have a lot of money to spend on it to make it easier because it's not critical. The pain ain't big enough.

Q. (By Mr. Melsheimer) Meaning that it's -- the problem that they would be solving is not big enough to pay a bunch of money for it?

A. Yes.

Q. All right. Now, let's take a look at Exhibit -- Exhibit 514. We've seen this a couple of times, Dr. Becker.

What -- what is it about Exhibit 514, back in 1998, that tells us about what Trilogy understood about demand for their product back in 1998?

A. This document tells us that they -- they had experienced some demand. And, in fact, if you -- in the

middle of the paragraph right above that where it says: Trilogy has been successful at strategically selling the software --

THE WITNESS: Above that.

A. -- to early adopters, because they customize the package and the value proposition for each and every client. So they did make some sales.

The second paragraph tells us what they -- their view of what it's going to take to go beyond those early adopters.

Q. (By Mr. Melsheimer) So these are the people, your neighbors or people that you might see at church, who have just got to have the newest, fanciest thing first, and they might pay that extra money for a flat screen TV as opposed to waiting until the price goes down.

A. This is more than just the flat screen TV; this is the custom-built flat screen TV.

Q. So Trilogy has been successful at strategically selling the software to early adopters, because Trilogy customized the package.

So it's a fancy version of it?

A. Yes.

Q. And what are the challenges about going mainstream?

A. What they recognized was that their value proposition was going to be very challenging in going beyond those early adopters and that they had -- after eight months of working on the segment, they'd failed to reach acceptance of the mainstream, meaning the customers beyond the early adopters.
Q. What did they say about their success rate?
A. Well, their success rate -- what I read this to say is that their success rate, beyond the early adopters, was about 1 in 40.
Q. All right. Now, were you here for Mr. Carter's testimony about the possibility and the prospect of selling Trilogy to -- selling Pricer to thousands of other customers who did not run SAP?
A. Yes.
Q. Do you recall he said that?
A. Yes.
Q. What -- what conclusions do you draw from -- from that testimony?
A. Again, they -- they lead me to the conclusion that by 2003, this proposition or the -- the pitch of Pricer at $1.8 million was something that just wasn't going to be successful in the marketplace.
Otherwise, Trilogy wouldn't have essentially stopped trying to sell it to the thousands

of companies that were not affected by SAP's having the feature and the product.

Q. So we might do a little timeline.

From 1998 to 2003, what did you find in the marketplace that Trilogy knew about its Pricer product?

A. I found that -- that the evidence says they knew that the value proposition they had in '96 to '98 was limited, challenging.

Q. The price is too high?

A. Yes.

Q. Was there a big demand or a small demand?

A. The evidence that I've seen suggests that certainly the demand at $1.8 million was very small.

Q. And what about their success rate in calling on customers during that timeframe?

A. 1 in 40.

Q. Now, what about, though, after 2000 -- starting in April of 2003? The patent issues. Is Trilogy in the money, able to make a bunch of sales?

A. Not based on any evidence that I've seen.

Q. Have you seen that they've sold a single new -- to a single new Pricer customer since April of 2003?

A. No.

Q. Were they --

A. They haven't.

Q. Now, what does that fact -- what does that fact tell you about the reasonableness of Mr. Weinstein's assumption that starting in April of 2003, they could have made six sales that year, eleven or twelve the next year, and then twelve sales all the way through to 2010? What does that tell you about that assumption?

A. It tells me that that's unreasonable and completely unrealistic.

Q. And how do you reconcile that assumption with Mr. Carter's testimony that there were thousands of customers that were not using SAP that they could sell to?

A. You can't -- well, you can't reconcile Mr. Weinstein's position to -- to what Mr. Carter said.

Q. Based on this evidence, can you conclude that Trilogy would have made even one more sale if SAP did not have the specific pricing feature starting in April of 2003?

A. I don't think it's reasonable to conclude that they would, not with the -- with the -- essentially the pitch that Mr. Weinstein has assumed they would be in the market with.

Q. Now, do they get to -- starting in April 2003, do they get to change everything that's happened before?

A. No.

Q. Do they get to put all those companies we saw in that quadrant -- do they get to tell them to get out of business?

A. No.

Q. Do they get to magically fix in 2003 all the technical and integration problems they were having with their software?

A. No. They have to deal with all that.

Q. Do they get to magically erase all the customer complaints and problems they were having?

A. No.

Q. So as a result of your analysis and study of the evidence, do you conclude that Versata or Trilogy has satisfied either Panduit Factor 1 and 2 for the purposes of determining lost profits?

A. I don't think they have. I don't believe you can reasonably conclude that they would have made any sales. Therefore, they haven't satisfied those two factors.

Q. All right. Let's talk about -- let's talk about Mr. Weinstein's calculations.

So the first subject of your testimony was whether they were even eligible for lost profits. That's this issue about whether or not there's demand

for the patented feature, and if SAP wasn't offering that feature starting in April 2003, a bunch of people would have flocked to Trilogy and bought their product, right?

A. Right.

Q. That's this demand for the patented invention and then looking at the acceptable non-infringing alternatives, right?

A. Right.

Q. So let's show we're on the same page. Was there demand for the patented invention?

A. Not in 2003.

Q. Well, but I thought that the Trilogy people said that -- that back in -- back in the mid-'90s and late '90s, they were just blowing and going, making all these sales, and they have that chart that they keep showing that shows them going off the cliff.

Doesn't that prove that there was demand for that patented invention?

A. Well, again, it's like our flat screen TV analogy. The fact that people were willing to buy it in '95, '96, given how -- given laptop speeds and given that -- this sort of state of technology back then and that they were providing this highly customized solution doesn't tell us anything about the market for -- you

know, would you sell a 3,000-dollar flat screen TV today? No.

Q. What about the presence of other alternatives to Trilogy in 2003?

A. Well, the -- the other piece of evidence that I find very significant is that, you know, that cliff dropping off and that whole period of time to the right of that, you've got a substantial part of the market -- I think Mr. Carter said thousands of companies -- out there unaffected by SAP's including the feature, and demand from those companies dropped to zero as well.

So it kind of tells you what's going on in the market with the reaction to the pitch for this product.

Q. Is any of that SAP's fault?

A. No.

Q. Now, let's look at Mr. -- Mr. Weinstein's opinions. You, obviously, have some opinions and some analysis that the numbers he did come up with are exaggerated.

A. Yeah. I believe the 285-million-dollar number is just -- can't be supported at all.

Q. Does this chart summarize why?

A. Yes.

Q. Why don't you go through it with us.

A. First is his price and volume assumptions are unreasonable, so basically what we've been talking about, that to assume that you could take the price value proposition from 1995, '96, '97, '98, and just sort of pick it up and dust it off and show up in 2003 with the same sales pitch and expect it to work, I think is unreasonable, given what happened in the market.

Second, his profit margin assumptions of 72-percent margins on hundreds of millions of dollars of sales are just completely unreasonable.

Q. Now, let's -- I want to talk about that, that profit margin thing, because I talked a little bit about that with -- with Mr. Weinstein.

So the -- the 72-percent profit margin -- that means for every dollar in revenue, you get 72 cents.

A. Yes.

Q. What criticisms can you offer the jury about why that's an unrealistic or unreasonable approach?

A. Well, that's just completely inconsistent with their actual financial performance.

I heard Mr. Weinstein say that that was from audited financial statements. I can tell you, I've seen their audited financial statements, I've seen lots of financial documents from Trilogy, and their level of

profitability in any of these years has never even remotely approached that.

Q. For the whole company, they've never even come close to 72 percent?

A. Never.

Q. Now, let me ask you this: Have you heard the term cherry picking?

A. Yes.

Q. What does that mean?

A. Well, that's to go select the particularly ripe fruit that you want to make a point.

Q. Does it sound like cherry picking to you to pick 10 customers and use that as a profit margin for all the Pricer sales?

A. Yes. In particular given how large these 10 customers are. I mean, they're -- they're nowhere close to being representative of customers that even if you accept Mr. Weinstein's model are going to pay $1.8 million.

I think we heard one of them, they said they'd spent $90 million with Trilogy.

Q. Let's take a look at Defendants' Exhibit -- Plaintiffs' Exhibit 1308. Are these some audited or consolidated financial statements that you looked at from Trilogy from 1998, 1997, and 1996?

A. Yes.

Q. Okay.

A. These are the actual Ernst & Young audited financial statements for '96 to '98, the same years that is Mr. Weinstein says he's picking up his actual performance.

MR. MELSHEIMER: Mr. Barnes, can you go to the Bates-numbered page 872, Trilogy 872?

There it is. Thank you.

Q. (By Mr. Melsheimer) What are we seeing here -- and, again, is this a document you created?

A. No. This is the audited financial statements that Ernst & Young provided.

Q. Dr. Becker, that document that Mr. Weinstein relied on, was that something that -- as you understood it, that was kept in the ordinary course of the company's business or that it was -- or was it something that was created for the purposes of this litigation?

A. I don't see any evidence that it could have been kept in the ordinary course of business because it covers such a broad time period, and it's just these selected customers. I haven't seen any explanation as to why it was created or when.

Q. Did you hear that Mr. Smith helped him put it together?

A. Yes.

Q. Okay. Let's take a look at -- this is the actual financial statements that the company operates under.

What is this telling us about -- and there's a lot of numbers up here, and I know it's getting close to lunch, but you say that Mr. Weinstein's profit margin analysis is exaggerated and unreasonable.

I want you, Dr. Becker, to help the jury understand why you think that and take us through this to explain it.

A. Okay. Let's just use '98 as an example, because that was one of the years in Mr. Weinstein's sort of baseline as you would call it. I picked that year, because the number is right around a hundred, so I can do the math in my head. Their revenue, license fees, content revenue, service fees, and maintenance.

So these are, with the exception of content, the same things that Mr. Weinstein says they would have sold in this but-for world: Licenses for 1.8, plus consulting and maintenance revenue on top to get it to 5 million a customer.

So they -- they actually did take in a hundred million dollars in 1998. His analysis purports to take into account the cost of the service fees,

research and development, and selling and general and administrative.

We can see here what happens if you take those costs actually into account. There's $98 million of cost against the hundred million in revenue. What actually generated even operating profit is 6.5 million. So, basically, 6 percent, not 72 percent.

Q. Okay. Now, is that comparing apples to oranges, in terms of what Mr. Weinstein did?

A. No. I mean, in terms of the -- the categories, what he purported to be measuring was the profitability of license, consulting, and maintenance, after deducting cost of service, research and development, and selling and general administrative, and somehow he gets to 72 percent when, if you look at the audited financial statements, they're only making 6 percent.

Q. And, again, he takes revenues minus expenses and gets to income in -- in the rough way that he did, right?

A. Right. In -- in the way he did it, but just for these top 10 -- you know, their 10 biggest customers.

Q. Well, but I thought that Mr. Weinstein or maybe some other witness said, you know, it's just a question of just print out some more of this software, and you

don't really have that much cost in printing it out or putting it on a disk and load it up, and you're good to go.

A. Well, if this were Microsoft or the kind of software like Quicken that you might buy at the store -- in the business, we call that shrink-wrap software.

In the shrink-wrap software business, if you've got a hundred copies and you want to sell the 101st copy, it may be the case that you could get margins -- you know, drop 70 cents out of every dollar to the bottom line, because you really are just printing one more box, making one more copy of the disk.

With this kind of software, particularly with what Trilogy was doing, they spend an enormous amount of money just to land the deal, every deal, and then once they have the deal in hand, it's sort of like getting a big fish in the boat then the troubles really start. Then they had to spend a bunch of money to actually get the thing on the -- on the stringer.

Q. And is -- does Mr. Weinstein just assume that starting in 2003, poof, April 2003, there's -- they're going to be able to make all these sales and not have all these associated expenses?

A. Well, he said -- he's taken into account selling costs, but there's a tremendously long pipeline

in this business to sell.

So if April 2003 they start selling, one is, it seems to me, that to be reasonable, you have to assume they'd have to spend some time and money getting the product up to speed so that it would be attractive in that market, that it's going to dust off the 2000 -- the 1998 product.

But even just the selling cycle being six months or longer, we heard Mr. Carter, I think, say he -- he builds in no delay whatsoever.

Q. Is that reasonable?

A. No.

Q. Is that fair?

A. No.

Q. I want to talk about how Mr. Weinstein got to these 93 customers.

THE COURT: Well, let's -- Mr. Melsheimer, we're going to break for lunch, and we'll pick up there after lunch.

MR. MELSHEIMER: All right.

THE COURT: Ladies and Gentlemen, take an hour and 15 minutes for lunch. Enjoy your lunch recess. Don't talk about the case.

Y'all are excused.

LAW CLERK: All rise for the jury.

(Jury out.)
THE COURT: You may step down.
THE WITNESS: Okay.
THE COURT: Folks out in the audience, if any of you has a Blackberry, turn it off when you're in the courtroom. That will help us a great deal. We're experiencing some feedback to the mikes. And I think we've got it under control, but that may be contributing to it.
Also, I think we're going to ask the CSOs to come in over the lunch break and see if we can't turn off the -- the mikes that are on the counsel table, shut them off altogether. That's also attributing to it.
But y'all are excused. If you want to go ahead and come back at 1:00 o'clock to present your motions.
MR. MELSHEIMER: That would be fine, Your Honor.
Might I also just put on the record as a housekeeping matter something right now? I will be very brief --
THE COURT: Yes.
MR. MELSHEIMER: -- which is we would renew and proffer into evidence Dr. Becker's reliance on the account executive interviews and the other data that

was excluded by the Court as relevant to use and thus relevant to valuation.

And if he were to be allowed to testify, he would describe what is -- what is in our briefing opposing that motion and talk about the interviews that he did showing that -- that -- and his conclusion reflected the lack of use.

THE COURT: All right. I'll -- if you'll have someone just get me a copy of your oppositions to the motions, and I'll receive those as Court's 3.

MR. MELSHEIMER: Thank you, Your Honor.

THE COURT: Okay. All right. I'll see y'all at 1:00 o'clock for presentation of JMOLs.

(Lunch recess.)

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/________________________ May 11, 2011
SHELLY HOLMES, CSR
Deputy Official Court Reporter
State of Texas No. 7804
Expiration Date: 12/31/12

/s/________________________ May 11, 2011
GLENDA FULLER, CSR
Deputy Official Court Reporter
State of Texas No. 1042
Expiration Date: 12/31/12